Central Law Journal.

ST. LOUIS, MO., FEBRUARY 3, 1899.

The Supreme Court of Illinois, some time ago, was called upon to apply a statute of Kansas governing the liability of stockholders of corporations, in a suit to enforce same, instituted in the State of Illinois. In that case the Illinois court ruled in effect that the provision of the Kansas constitution regarding corporations is not self executing, but that legislation is required for its proper enforcement. This was the case of Tuttle v. National Bank of Republic, 161 Ill. 497. In a case just decided—Bell v. Farwell,—involving a somewhat similar question, an effort was made to induce the court to reverse its ruling, but without effect, the court in terms adhering to its former decision and holding that the liability imposed upon stockholders by the constitution and statute of Kansas, is not penal in its nature; hence, in the construction of contracts, and in ascertaining their validity, the law of the country where the contract was made or is to be performed, must in general govern, and this court will enforce the construction of the foreign statute adopted by the highest court of its State, although it might find that on similar language in our own State, it would place a different or even reverse construction, that although the liability of a Kansas stockholder to the corporate creditors is imposed by statute, yet it is one arising out of contract, since the charter provides that the stockholders shall be liable to creditors individually.

Under the declaration in the case upon the facts, which were admitted by demurrer, it appears that, according to the law of Kansas, the stockholder is liable to the judgment creditors of the corporation, as upon a contract which is suable everywhere, and the facts alleged in this respect are different from those in any case heretofore presented to this court. The Illinois court points out the distinction between the case at bar and Tuttle v. National Bank of Republic, *supra*, and states that had the statutes set up in the case at bar, and their construction by the Kansas Supreme Court, been before the Supreme Court of Illinois, in the Tuttle case, a different result might have been reached on the question of remedy; nor does the rule established in Young v. Farwell, 139 Ill. 326, and Patterson v. Lynde, 112 Ill. 196, apply to this case, as stated in the declaration. They also hold that a resort to a court of equity in the State of Kansas is not required before bringing an action to enforce the individual liability of the stockholder, as it is not to the corporation, nor to all its creditors, but to each individual creditor, from each individual stockholder, not joint, but several.

Efforts have been made in various of the States to enact statutes, having for their object, the prevention of lynch law. A statute of that kind was adopted in Ohio in effect giving the next of kin of a person killed by a mob, the right to recover $5,000 from the county. The first cour t to consider the validity of this statute declared it unconstitutional. Caldwell v. Cuyahoga County, 15 Ohio C. C. 167, affirming 4 Ohio N. P. 249, on the ground that it taxes the county for purely private interests. In Mitchell v. Champaign County, 5 Ohio N. P. 158, the court of common pleas again held the statute unconstitutional on the ground that it denied due process of law and the right of trial by jury. But this latter decision is now reversed by the circuit court which holds the act valid on the ground that its main purpose is not to give a recovery to private persons, but to impose a penalty on the county which is given to the next of kin, not because they are damaged but because the legislature sees fit thus to dispose of the penalty. "Whether or not" says Judge Wilson, in the course of a well reasoned opinion "the statute is subject to any of these constitutional infirmities depends upon the purpose intended to be subserved by its enactment. If it simply undertakes to give to private persons a right to recover for the pecuniary injury they may suffer by reason of the death of a relative from mob violence, the statute fixing the amount of the recovery, and that being the sole purpose of the statute, it would be the exercise of judicial power, for that it determines without the intervention of a jury the extent of the injury and the amount in damages; and it would be open to the other objections as well. If, however, it be not the main purpose of the act to give the right and fix the amount of recovery to a private person in such case, but rather to assess a fine upon and collect a penalty from a community which has

failed to prevent mob violence, it subserves a public purpose—the preservation and protection of life and property, to which end all laws are enacted—and would be an exercise of the police power of the government, not the judicial.

"Legislation of this nature, whether it fixes a right to recover for the destruction of property or injury to the person or for the death of a person occasioned by a mob, is not enacted for the sole purpose of giving to a party the right to recover his damages, but is primarily the assessment of a fine upon a political subdivision of the State, such as a county, for its failure in the exercise of the duties of good citizenship to prevent riot and suppress mob violence. The object of the statute in question is to subserve such public end, and is the exercise of the police power of the government, which is wholly within the province of the legislature. The amount fixed by the statute as being recoverable by the administrator of the deceased party for the next of kin is not damages, but a penalty, the extent of which the legislature, in its wisdom, may determine. There is no occasion for an inquiry of damages. It must be presumed that the legislature has fixed upon such amount as it deemed sufficient to make the citizens in every community active and vigilant in the enforcement of the law and in the detection and prevention of crime. Under the right provided for the recovery of damages for death caused by negligence the rule is different. In such cases there is reason for an inquiry of damages. The parties can recover only to the extent of their pecuniary injury; but under this statute a fixed amount is made payable to the next of kin, regardless of whether they are pecuniarily injured or not. It is not because they are damaged that they receive it, but because this penalty, which the statute places upon the community, must be disposed of in some way, and the legislature has seen fit to cast it upon the next of kin."

NOTES OF IMPORTANT DECISIONS.

BANKRUPTCY — PRIORITY OF DEBTS — WAGES DUE TO WORKMEN—JURISDICTION OF FEDERAL COURT ON APPEAL.—The case of *In re* Rouse, Hogard & Co., recently decided by the United States Circuit Court of Appeals, is of special interest, not only because of the importance of the questions involved, but also for the reason that it is the first bankruptcy opinion rendered by this or any other court of appeals under the bankrupt law of 1898. The court construes the sections of the bankrupt law as to what debts are to have priority and also in relation to wages due workmen. The court also states when it has jurisdiction on appeal in bankrupt cases, and when in equity. The following is from the opinion: "It is this direction for the payment of labor claims in priority to the general creditors that is asked to be reviewed here as a question of law.

"The bankrupt law, chapter 7, section 64*b*, provides that 'The debts to have priority, except as herein provided, and to be paid in full out of the bankrupt's estate, and the order of payment shall be (4) wages due to workmen, clerks or servants which have been earned within three months before the date of the commencement of proceedings, not to exceed $300 to each claimant. (5) Debts owing to any person who by the laws of the States, or of the United States, is entitled to priority.'

"The laws of the State of Illinois with respect to voluntary assignments provides, Rev. St. Ill., 1898, chapter 10, section 6, page 172: 'That all claims for the wages of any laborer or servant, which have been earned within the term of three months next preceding the making of such assignment, and which have been filed within said term of three months after such assignment, and to which no exception has been made, or to which exception has been made and the same having been adjudicated and settled by the court, shall, after the payment of the costs, commissions and expenses of assignment, be preferred, and first paid to the exclusion of all other demands and claims.'

"By chapter 38 A, Rev. St. Ill., 1898, page 629, it is provided 'That hereafter, when the business of any person, corporation, company or firm shall be suspended by the action of creditors, or be put into the hands of a receiver or trustee, then in all such cases the debts owing to laborers and servants which have accrued by reason of their labor or employment, shall be considered and treated as preferred claims, and such laborers or employees shall be preferred creditors, and shall be first paid in full, and if there be not sufficient to pay them in full the same shall be paid from the proceeds of the sale of the property seized.'

"It is preliminarily insisted by the labor claimants, the respondents here, that this court cannot entertain jurisdiction of the matter for the reason that no claim allowed amounted to the sum of $500 or over, and that the petitioners, the general creditors, cannot accumulate several claims which shall aggregate over $500, and thereby confer jurisdiction upon this court. The latter proposition is doubtless true; but we think that the contention that this court is without jurisdiction is made in misapprehension of the statute. The bankrupt act, section 24, invests the Circuit Courts of Appeals with appellate jurisdiction of controversies arising in bankruptcy proceedings, and section 25 provides that an appeal

may be taken (3) from a udgment allowing or rejecting a debt or claim of $500 or over. Such an appeal is to be taken within ten days after the judgment appealed from. It is further provided by section 24*b* that the courts of appeal shall have jurisdiction in equity, 'either interlocutory or final, to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction. Such power shall be exercised on due notice and by the party aggrieved.'

"It will be seen that the statute contemplates two different proceedings and for two different purposes. The one is a review of an adjudication touching the merits of a claim which may rest upon a question of fact or a question of law. Such an adjudication can only be reviewed by appeal within ten days from the adjudication, and will only lie where the claim adjudicated amounts to $500 or over. The appellate court reviews the facts as well as the law. In the other case the appellate court acts, not upon appeal but by original petition of a complaining party, and is given authority to review and to revise in manner of law only the proceeding of the bankrupt court that is complained of. If the controversy coming before us was with respect to the merits of the several claims of these labor claimants, we should be wholly without jurisdiction, for there is neither an appeal nor does the amount allowed to any one claimant exceed the sum of $500. But there is no controversy here with respect to the merits of the claims. The debts are conceded. The counsel for the labor claimants, the respondents here, distinctly states, in his brief, 'and no objection is raised in this court as to the validity or justness of any of such claims.' The only question then sought to be raised by this petition is whether, conceding the justness of the claims, they are as a matter of law entitled to priority of payment over the general creditors of the bankrupt. That is a question which we think clearly falls within the subdivision B of section 24, and can be determined by this court upon petition.

"Coming then to the merits—it may be remarked by way of preference that the several provisions of the law of the State of Illinois with respect to the priority of payment to be allowed labor claims, are not altogether consistent. In the case of voluntary assignments the claim of the laborer which is preferred must have accrued within three months next preceding the making of the assignment. In the case of a suspension of business by action of creditors there is neither limit as to time nor as to amount. The reason of the distinction is not easy to understand. It is also to be observed that the bankrupt court whose order is here under review, proceeded upon the theory that section 64*b* (4) applied as to the amount but did not apply as to time. Singularly enough, priority of payment of claims was allowed upon the theory that the provision of section 64*b* (5) governed, and that, notwithstanding the previous provision, wherever the laws of a State granted priority with respect to payment of labor claims, those laws must be recognized and followed. Yet here the bankrupt court has allowed priority with respect to these claims without regard to limitation of time, but has imposed the limitation of the bankrupt act with respect to amount when the law of the State under which priority was allowed contains no such limitation.

"The question here is one of construction of the bankrupt law of the United States, and is this: Whether the congress, having spoken by a particular provision — section 64*b* (4) — with respect to the priority to be allowed labor claimants, and having subsequently in the same act—section 64*b* (5)—spoken generally with respect to the recognition of the priorities allowed by the laws of the State or the United States, the latter general provision overrides or enlarges the prior special provision.

"The bankrupt act by its terms went into full force and effect upon its passage July 1, 1898, and notwithstanding the provision that no voluntary petition should be filed within one month of the passage of the act, and that no petition for involuntary bankruptcy should be filed within four months of the passage of the act, the bankrupt law was operative from the date of its passage, and was effective from that date to supersede the insolvency laws of the several States. Parmenter Manufacturing Company v. Hamilton, 51 N. E. Rep. 529; Blake, Moffitt and Towne v. Francis-Valentine Company, 89 Fed. Rep. 691; *In re* Bruss-Ritter Company, Eastern District of Wisconsin, 90 Fed. Rep. It is not doubted that the congress could constitutionally in the bankrupt act recognize the varying systems of the several States with respect to exemptions and with respect to priority of payment of debts. Darling v. Berry, 4 McCrary, 407. So that the question recurs, what was the real intention of the congress as expressed in subdivisions 4 and 5 of section 64*b*. In the first subdivision congress addresses itself to the subject of labor claims and particularly provides that all wages that have been earned within three months before the date of the commencement of proceedings in bankruptcy, not to exceed $300 to each claimant, shall be awarded priority of payment. It recognized, it must be assumed, the various provisions of law in the several States with respect to the subject. It found them not to be in harmony, and in some States, as notably Illinois, the laws upon that subject not to be consistent with each other. It found limitation as to time different in the different States. It found that in some of the States priority of payment was unlimited as to amount, and in some of the States limited to so small a sum as $50. With this divergence within its knowledge the congress spoke to the subject specially and particularly and limited the amount to $300, and, as to time, to wages earned within three months before the commencement of proceedings. Can, then, the subsequent provision of the law [illegible]

ing immediately thereafter allowing priority of payment for all debts owing to any person who by the laws of the States or the United States is entitled to priority, be held to enlarge the prior provision so that the statute should be read that in any event the laborer should be entitled to priority of payment in respect of wages earned within three months prior to proceedings and in amount not exceeding $300, and that wherever the laws of the State of the residence of the bankrupt grant the laborer priority of payment without limit as to time or amount, or imposes a limit in excess of that imposed by the bankrupt act, he shall be entitled to a further priority in payment according to the law of the particular State? We think not. It is not to be supposed—unless the language of the act clearly so speaks—that the congress intended that in the administration of the act there should be a marked contrariety in the priority of payment of labor claims dependent upon locality. It is an elementary principle of construction that where there are in one act or in several acts contemporaneously passed, specific provisions relating to a particular subject, they will govern in respect to that subject as against general provisions contained in the same act. Sutherland on Statutory Construction, sec. 158.

"Thus in State v. Trenton, 18 N. J. L. 67, it is said: 'When the intention of the lawgiver which is to be sought after in the interpretation of a statute, is specifically declared in a prior section as to a particular matter, it must prevail over a subsequent clause in general terms which might, by construction, conflict with it. The legislature must be presumed to have intended what it expressly stated rather than that which might be inferred from the use of general terms.' And so in Taylor v. Oldham, 4 Chancery Div. 398, it is declared that general provisions in an act of parliament do not override special provisions. So that where an act contained special provisions as to particular property, they must be read as exceptions to the general provision whether contained in the same or any other act. And so, also, it was held in Attorney-General v. Lamplough, 3 Exchequer Div. 214, that where special words in any statute any subject-matter which is aptly described by the special words comes within the purview of the statute by force of the special words and not of the general words.'

"Dwarris, page 658, thus states the rule: 'Where a general intention is expressed, and the act also expresses a particular intention incompatible with the general intention, the particular intention is to be considered in the nature of an exception. While, if a particular thing is given out or limited in the preceding parts of the statute, this shall not be taken away or altered by any subsequent general words of the same statute.'

"In Felt v. Felt, 19 Wis. 193, Mr. Justice Paine states the rule thus: 'But it is a well-settled rule of construction that specific provisions relating to a particular subject must govern in respect to that subject, as against general provisions in other parts of the law, which might otherwise be broad enough to include it.'

"In State *ex rel.* Lutfring v. Goetze, 22 Wis. 363, 365, the same learned judge said: 'There is no rule or construction more reasonable and none better settled than that special provisions of a statute in regard to a particular subject will prevail over general provisions in the same or other statutes, so far as there is a conflict.' See also Hoey v. Gilroy, 129 N. Y. 138; Stockett v. Bird, 18 Md. 484.

"Our conclusion is that congress having spoken specifically to the subject of priority of payment of labor claims, what it has said upon that subject expresses the particular intent of the law-making power, and that provision is not to be tolled or enlarged by any general prior or subsequent provision in that act. That which is given in particular is not affected by general words. So that the statute providing for the priority of payment of debts referred to in subdivision 5, must be construed to mean other debts and different debts than those specified in subdivision 4. We are not unmindful of the particular hardship which our conclusion, it is said, will work out here. It arises, from the fact that under the law, proceedings in bankruptcy, except by voluntary act of the bankrupt, could not be commenced in time to fully protect these labor claimants. We regret that this is so. It is a misfortune arising from the provisions of the act; but to remedy this particular wrong we cannot override a recognized canon of construction of statute law."

CRIMINAL LAW—EMBEZZLEMENT — VENUE.—It appeared in State v. Hengen, 77 N. W. Rep. 453, decided by the Supreme Court of Iowa, that defendant, living in P county, contracted with an installment house doing business in that county to travel and sell goods for it. The goods were sent from P county to defendant in other counties, and there sold, and the proceeds converted. It was held that the venue of a prosecution for embezzlement was properly laid in P county. The court said: "If it be conceded that the goods were delivered by Edwards to the defendant as his agent in Polk county, or were sent from there to him elsewhere, and upon the agreement that he was to account for them to Edwards, in Polk county, and he failed to do so when this was demanded, and it appears that he fraudulently converted the same to his own use by selling and appropriating the proceeds in some other county, had the district court of Polk county jurisdiction to try him for such offense? In other words, was the venue properly laid in Polk county? Our statute provides that 'when a public offense is committed partly in one county and partly in another, or when the acts or effects constituting or requisite to the consummation of the offense occur in two or more counties, jurisdiction is in either county, except as otherwise provided by law.' Code, § 5157. The venue

can always be laid in the county where the conversion actually took place, but it is often as difficult to determine where as it is when that happened. This is especially true of an agent who travels as salesman from town to town through several counties. The authorities agree that, if the transaction constituting the offense extends through different counties, that in which the conversion took place has not the exclusive jurisdiction. 1 Bish. Cr. Proc. 61; 7 Enc. Pl. & Prac. 412. But, unless some essential element constituting the crime of embezzlement occurred in Polk county, the venue could not properly be laid therein. The establishment of the contract creating the fiduciary relation, and the duty to account for the property received, is quite as necessary for conviction as proof of conversion. In Reg. v. Murdock, Dennison & P. Crown Cas. 298, money was received by the accused in Derbysbire, though both parties lived at Nottingham. Upon inquiry concerning the money at the latter place, Murdock admitted having spent it, and the venue was held to be there; Talfourd, J., remarking: 'My opinion is, the offense was completed when the prisoner refused to account to his master at Nottingham.' In Reg. v. Rogers, 3 Q. B. 28, the sending of a letter by the defaulting employee, in effect denying the receipt of the money from another county, where he had collected it, to his employers, and its receipt by them in that, where it was his duty to account, and where both resided, gave jurisdiction in the latter county. In these cases the judges assigned different reasons for their conclusion, and at the last Huddleton dissented. The demand and refusal must be regarded, however, only as evidence of conversion, and not essential to constitute the crime. State v. Brooks, 85 Iowa, 366, 52 N. W. Rep. 240; Hollingsworth v. State, 111 Ind. 289, 12 N. E. Rep. 490; State v. Mims, 26 Minn. 191, 2 N. W. Rep. 492. If this were not so, the offender might prevent the completion of the offense by flight. And it follows that, if the conversion is made complete by the appropriation of the property in one county, the mere demand and refusal would not add to it in any way, and thereby aid in conferring jurisdiction in the place of such demand. If there were no evidence of such a conversion elsewhere, it might be inferred to have been at the place where the demand is made, in event the duty to there account existed. Reg. v. Murdock, *supra*; Campbell v. State, 35 Ohio St. 70. In the last case the defendant was shown to have had the money of his principals in the county where it was his duty to account, and the fact that he expended it in another county was held to be no defense. In State v. Baily (Ohio), 36 N. E. Rep. 237, the defendant was employed by Hood Bros. Co., in Toledo, Lucas county, to sell goods for cash or on the installment plan in Fremont, Sandusky county, but to report in person or by letter to the firm at Toledo at the end of each week. Part of the goods were delivered to him in Toledo, and others sent to him at Fremont. After working some time, he caused a letter to be written and mailed to them, saying his sales were small; he was discouraged, but would await their further orders. He had sold the goods on hand, and spent part of the proceeds there, and afterwards the remainder in Buffalo, N. Y., to which place he immediately absconded. The court, in holding the venue to be in Lucas county, said, through Bradbury, C. J.: 'It is the defendant's duty to account, together with his neglect or refusal to do so, that constitutes the fraudulent breach of duty. A demand at a place when and where he owes no duty is, of itself, not enough. The defendant's obligation was to account to his employers at Toledo, in Lucas county. This obligation pressed upon him with equal force whether he was within or without the county. His refusal, neglect, or omission to discharge this duty may be as clearly manifested by silence and the circumstances of his absence, or by letter, as by spoken words, unless there is some magic in personal presence. That the presence of the offender within the county when a crime is committed is not always necessary to give jurisdiction is a settled principle. Norris v. State, 25 Ohio St. 217. The question is by no means free from difficulty, but we think the weight of authority, as well as of reason, authorizes us to hold that the making of the contract in Lucas county, the express duty it imposed upon the defendant to account weekly to his employer there, either in person or by letter, together with the fact that he did report to them falsely by letter, which they received, constituted such integral and essential parts of the transaction as entitle venue to be laid in Lucas county.' The case at bar is like that from which we have quoted, and we are inclined to follow it. The defendant lives in Polk county, where the contract was made, and from whence he received the property. He agreed to account to his employer at Des Moines. His failure or neglect or refusal to do so elsewhere would not amount to conversion, for he owed no such duty to his employer. That he fully realized this was shown by his insistency on settling with Pattee at Des Moines. Whether there or elsewhere, his obligation to account for the property at that place continued, and his failure to do so when then requested at that place was a clear breach of duty he owed to his principal. The existence of the contract, and the breach of the particular duty it imposed, were essential elements of the transaction constituting the embezzlement. See 7 Enc. Pl. & Prac. 412; State v. Small, 26 Kan. 209; State v. Whiteman, 9 Wash. 402, 37 Pac. Rep. 659; McClain, Cr. Law, § 650. We do not overlook the case of People v. Murphy, 51 Cal. 376, announcing a contrary rule but deem that adopted as having better support in authority and reason."

LIABILITY OF PUBLIC CORPORATIONS FOR POLLUTING STREAMS.

Cities.—One of the natural offices of all bodies of water is to carry off and dissipate by their perpetual motion and currents, the impurities and offscourings of the land,[1] and every owner of land bordering thereon has the right, subject to the limitations hereinafter noted, to avail himself of this means of disposing of refuse.[2] Especially is this true of municipal corporations, which are charged by law with the power and duty of constructing and maintaining sewers and drains.[3] It has come to be the general rule that cities adjacent to rivers or lakes make use of them in disposing of their sewage.[4] It cannot be expected that, as population increases, these bodies of water will remain absolutely pure,[5] and both the public and the riparian owner must necessarily submit to a certain amount of inconvenience and annoyance from the reasonable use of such waterways for drainage purposes.[6] On the other hand the riparian owner of property bordering on a river or stream has the undoubted right to have the water come to him in substantially its natural state, in quality as well as in quantity, and fit for watering stock and for other domestic uses.[7] From the conflict of these two rights—that of the city to dispose of its sewage, and to make reasonable use of public watercourses for that purpose, and that of the riparian owner to have the water come to him in substantially its natural state—arises the well established rule that a city may empty its sewers into such bodies of water,[8] but cannot do so in such a way as to create a nuisance, without incurring liability to parties specially injured thereby,[9] and being liable as well to indictment on behalf of the public, if the nuisance is a public one.[10] The authorities cited in the last two notes, relate to the pollution of rivers and streams by city sewerage, but the same rule has been applied to city sewers emptying into private docks in tide water,[11] arms of the sea between high and low water,[12] private streams,[13] private ponds,[14] and streams leading thereto;[15] mill ponds,[16] and canals.[17] Since riparian rights depend on ownership of the bank, rather than ownership of the bed of the body of water,[18] no reason is perceived why the same rule would not apply to the case of navigable lakes or ponds, where the title to the bed is in the State.[19] The liability in every case depends upon whether or not a

[1] Haskell v. New Bedford, 108 Mass. 208, 214; Atty.-Gen. v. Mayor, etc. of Kingston, 13 W. Rep. 888, 891; State v. Freeholders of Bergens County (N. J.), 18 Atl. Rep. 465, 467.

[2] Gould on Waters, sec. 220.

[3] Haskell v. New Bedford, *supra*; Walker v. City of Aurora (Ill.), 29 N. E. Rep. 741, 743.; Atty.-Gen. v. Mayor, etc. of Kingston, 13 W. Rep. 888, 891; Kuehn v. City of Milwaukee, 92 Wis. 263, 266; Merrifield v. Worcester, 110 Mass. 216.

[4] Kuehn v. City of Milwaukee, *supra*; State v. Freeholders of Bergens County, *supra*.

[5] Merrifield v. Worcester, 110 Mass. 216, 220; City of Richmond v. Tent (Ind.), 48 N. E. Rep. 610, 615.

[6] Atty.-Gen. v. Mayor etc. of Kingston, 13 W. Rep. 888, 891; Merrifield v. Worcester, *supra*.

[7] Gould on Waters, sec. 219, 205.

[8] Cases in note 3.

[9] Edmondson v. City of Moberly (Mo.), 11 S. W. Rep. 990; Village of Dwight v. Hayes (Ill.), 37 N. E. Rep. 218; City of Jacksonville v. Doan (Ill.), 33 N. E. Rep. 878, 880; Chapman v. City of Rochester (N. Y.), 18 N. E. Rep. 88; Robb v. Village of La Grange (Ill.), 42 N. E. Rep. 77; Atty. Gen. v. Leeds, L. R. 5 Chan. App. 583, 594; Atty.-Gen. v. Birmingham, 4 K. & J. 528; Atty. Gen. v. Hackney Local Board, L. R. 20 Eq. 626; Goldsmid v. Turnbridge Wells, L. R. 1 Eq. 161, aff'd L. R. 1 Chan. App. 349; Atty.-Gen. v. Colney-Hatch Lunatic Asylum, L. R. 4 Chan. App. 146; Morse v. Worcester, 139 Mass. 389; Good v. City of Altoona (Pa.), 29 Atl. Rep. 741; Owens v. City of Lancaster (Pa.), 37 Atl. Rep. 858; Butler v. Village of Edgewater, 6 N. Y. S. 174, 134 N. Y. 594; Board of Health v. Casey, 3 N. Y. S. 399; Bell v. City of Rochester, 11 N. Y. S. 305; Moody v. Village of Saratoga Springs, 45 N. Y. S. 365; Morgan v. City of Danbury (Conn.), 35 Atl. Rep. 499; Lind v. City of San Luis Obispo (Cal.), 42 Pac. Rep. 437; Shoen v. Kansas City, 65 Mo. App. 134; City of Bloomington v. Costello, 65 Ill. App. 407; Atty.-Gen. v. Acton Local Board, L. R. 22 Chan. Div. 221; Atty.-Gen. v. Met. Bd. of Works, 11 W. Rep. 820. It makes no difference whether the stream is navigable or not, provided a nuisance be created. See also *supra*, and also, Atty.-Gen. v. Mayor of Kingston, 13 W. Rep. 888, 892; City of Valparaiso v. Moffit (Ind.), 39 N. E. Rep. 909.

[10] State v. City of Portland, 74 Me. 268; People v. City of San Luis Obispo (Cal.), 48 Pac. Rep. 723.

[11] Haskell v. New Bedford, 108 Mass. 208; Brayton v. Fall River, 113 Mass. 218, 227; Butchers' Ice Co. v. City of Philadelphia (Pa.), 27 Atl. Rep. 376; Franklin Wharf Co. v. Portland, 67 Me. 46.

[12] Bolton v. Village of New Rochelle, 32 N. Y. S. 442.

[13] Atty.-Gen. v. Lunton Board of Health, 2 Jur. (N. S.) 180.

[14] Schriver v. Village of Johnstown, 24 N. Y. S. 1083.

[15] Smith v. Cranford, 32 N. Y. S. 375.

[16] Middlesex Co. v. City of Lowell, 149 Mass. 509; Proprietors of Lakes and Canals v. City of Lowell, 7 Gray, 223; Atty.-Gen. v. Mayor, etc. of Baringstoke, 45 L. J. Eq. (N. S.) 726.

[17] Boston Rolling Mills v. City of Cambridge, 117 Mass. 396.

[18] Gould on Waters, sec. 148; Delaplaine v. C. & N. W. Ry. Co., 42 Wis. 214, 230; Indianapolis Water Co. v. American Strawboard Co., 53 Fed. Rep. 970, 974.

[19] See Watson v. City of Toronto Gas & Water Co., 4 Upper Canada, Q. B. 158; Cedar Lake Hotel Co. v. Cedar Creek Hydraulic Co., 79 Wis. 297, 302.

nuisance has been created, injurious to the party complaining. The question of negligence on the part of the city is immaterial,[20] except where the pollution does not amount to a nuisance.[21] Of course, the ordinary rules apply as to what constitutes a nuisance. The injury to private rights must be not merely fanciful or trivial, but real and substantial, as such things are commonly judged.[22] But the pollution of the water of a stream by a city's sewage, to such a degree as to deprive the riparian owner of his right to pure water, and to injure his health and the value of his property by the smells arising therefrom, is held to be an actionable nuisance;[23] and this, although the sewer does not open directly upon his property, and no solid matter is thrown onto his land, but the pollution is brought from a long distance by the current of the stream.[24] But since the city has a right to the reasonable use of public watercourses for drainage purposes, and the public health requires the maintenance of a sewerage system by the city, no liability will attach unless it is clearly shown that the act of the city amounts to a nuisance.[25] Thus it is not a nuisance to drain surface water, with the usual impurities of the streets, into a river, although the fish are killed thereby;[26] nor is it a nuisance where the swiftness of the current dissipates the sewage and renders it harmless;[27] nor where the small amount of sewage,[28] the size of the river,[29] the distance of the party complaining from the sewage outfall,[30] the use of purifying arrangements,[31] or the fact that the sewers are not fully completed or their working shown,[32] make it doubtful if a nuisance exists. Similarly no indictment will lie unless the existence of the nuisance be clearly shown.[33] It is not *per se* a nuisance for a city to empty its sewers into one of the great lakes.[34] In determining the fact of the nuisance more heed will be paid to the facts which are proved than to the opinions of experts.[35] Counties, towns, and institutions, are regarded as sovereign parts of the State itself, and as such, according to the general rule, are not liable in damages for tort, in the absence of statute creating such liability.[36] But there are cases where a county has been enjoined from setting up or continuing a nuisance;[37] and it has been held that a county managing a poor farm could be enjoined from maintaining a nuisance thereon, since it was only incidental, and not necessary or essential, to the discharge by the county of its public functions.[38] It has likewise been held that a State lunatic asylum may be enjoined from polluting the waters of a stream by its sewers, although it would not be liable in damages for the injury occasioned thereby.[39]

Statutory Authority.—In constructing their sewerage systems municipalities are frequently operating under statutory authority. Unless the statute expressly authorizes the particular arrangement of sewers, it will not

[20] Cases in note 9; also Moody v. Village of Saratoga Springs, 45 N. Y. S. 365; State v. City of Portland, 74 Me. 268; City of Jacksonville v. Lambert, 62 Ill. 519.

[21] Merrifield v. City of Worcester, 110 Mass. 216, 220; City of Richmond v. Tent (Ind.), 48 N. E. Rep. 610, seems to hold in the absence of negligence, that a city is not liable for a nuisance resulting from the emptying of properly constructed sewers into a stream which is the natural drainage of the land on which the city is built. But the weight of authority makes the liability depend upon the fact of the nuisance. Negligence often accompanies the commission of a nuisance, but it is not an essential element of the offense.

[22] Walter v. Selfe, 4 Eng. Law & Eq. 15, 22; Crump v. Lambert, L. R. 3 Eq. 409; Wood on Nuisances, secs. 7 and 4.

[23] Notes 9 and 46.

[24] Goldsmid v. Turnbridge Wells, L. R. 1 Chan. App. 349, 352, 353, and cases in note 9; Wood on Nuisances, secs. 436, 437.

[25] Walker v. City of Aurora (Ill.), 29 N. E. Rep. 741, 743; Bainard v. City of Newton (Mass.), 27 N. E. Rep. 995; Atty.-Gen. v. Cochermouth Local Bd., L. R. 18 Eq. 172, 179; Robb v. Village of La Grange (Ill.), 42 N. E. Rep. 77, 79; Atty.-Gen. v. Mayor of Kingston, 13 W. Rep. 888, 890; Newark Aqueduct Board v. City of Passaic (N. J.), 18 Atl. Rep. 106, 110, 20 Atl. Rep. 54; Morgan v. City of Binghampton, 102 N. Y. 500; Atty.-Gen. v. Gee, L. R. 10 Eq. 131.

[26] Bainard v. City of Newton, *supra*.

[27] Walker v. City of Aurora, *supra*.

[28] Atty.-Gen. v. Cockermouth Local Bd., *supra*.

[29] Atty.-Gen. v. Gee, L. R. 10 Eq. 131, 135; State v. Freeholders of Bergen County (N. J.), 18 Atl. Rep. 465, 467.

[30] Newark Aqueduct Board v. City of Passaic, *supra*; Atty.-Gen. v. Cockermouth, *supra*.

[31] Atty.-Gen. v. Mayor of Kingston, *supra*; Fletcher v. Bealey, L. R. 28 Chan. Div. 688.

[32] State v. Freeholders of Bergen County (N. J.), 18 Atl. Rep. 465, 467; Bobb v. Village of LaGrange, *supra*.

[33] State v. Newark Board of Health (N. J.), 23 Atl. Rep. 949.

[34] Kuehn v. City of Milwaukee, 92 Wis. 263.

[35] Goldsmid v. Turnbridge Wells, L. R. 1 Chan. App. 349, 353; Newark Aqueduct Board v. City of Passaic (N. J.), 18 Atl. Rep. 106, 111.

[36] Dillon's Municipal Corporations, vol. II., sec. 961.

[37] City of Llano v. Llano County (Tex.), 23 S. W. Rep. 1008, 28 S. W. Rep. 926; Holmes v. Calhoun County (Iowa), 66 N. W. Rep. 145.

[38] Lefrois v. Monroe County, 48 N. Y. S. 519.

[39] Herr v. Cent. Ky. Lunatic Asylum (Ky.), 30 S. W. Rep. 971.

be presumed that the legislature intended that a nuisance should be created, unless such a result is the necessary and probably consequence of an exercise of the power granted. A general grant of powers does not justify the creation of a nuisance, if the sewerage system can be constructed without creating a one.[40] Even authority to change, widen and deepen a particular brook, and use it for drainage purposes, does not justify the creation of a nuisance in the stream into which the brook flows, if it can be avoided by adopting reasonable methods for purifying the sewage.[41] Where the statute expressly authorizes the particular arrangement of sewers, strict compliance therewith is a protection from indictment on behalf of the public for public nuisance.[42] But it has been doubted whether the legislature has the power to authorize either a municipality,[43] or a private or *quasi*-public corporation,[44] to create or maintain a nuisance that amounts to a taking of private property without compensation therefor, so as to bar an action by the parties specially injured. A statute is constitutional, however, which legalizes what would otherwise be a nuisance, provided the injury inflicted on private rights is not excessive or unreasonable;[45] and in such cases strict compliance with the statute is a protection even against a private action.[46] Injunction is the proper and only adequate remedy in cases of pollution of streams by city sewerage, when the injury is a continuing one that would lead to multiplicity of actions at law, and when irreparable damage is caused that is difficult or impossible of exact or adequate pecuniary recompense.[47] Where the nuisance arising from the pollution of a stream operates to destroy health and impair the comfortable enjoyment of property, the damage is held to be irreparable, and an action at law not an adequate remedy.[48] And regard will be had not merely to the comfort or convenience of the occupier of the estate, but also to the effect of the nuisance upon the value of the estate and the prospect of advantageously dealing with it.[49] Injunction has been frequently employed in cases of pollution of streams by city sewage.[50] In order to warrant the issuance of an injunction in such a case, the injury to the parties complaining must be not merely temporary or trivial, but permanent and serious.[51] It must be a continuous injury, not a mere occasional injury, which may never be repeated. Thus, a fisherman on Lake Michigan, whose nets were destroyed by the sewage of a city, has no right to enjoin the city from emptying its sewers therein, when his fishing operations extend over an area of four hundred square miles, and the injury may never occur again.[52] There are cases where a city has been enjoined from erecting its sewerage system, in advance of actual use proving it to be a nuisance; but that has been only where it was clear from the circumstances that a nuisance would result.[53] The determination of plaintiff's rights, in an action at law for damages, is not a necessary condition precedent.[54] The general rule, however, is that a very strong case must be made out to justify equitable interference in the case of a merely anticipated nuisance, and that usually no injunction will

[40] Edmondson v. City of Moberly (Mo.), 11 S. W. Rep. 990; Haskell v. New Bedford, 108 Mass. 208, 215; Moody v. Village of Saratoga Springs, 45 N. Y. S. 365; Siefert v. City of Brooklyn, 101 N. Y. 136; Morton v. New York, 140 N. Y. 207; Bacon v. City of Boston (Mass.), 28 N. E. Rep. 9; Pine City v. Munch (Minn.), 44 N. W. Rep. 197; Atty.-Gen. v. Leeds, L. R. 5 Chan. App. 583, 594; Atty.-Gen. v. Colney-Hatch Lunatic Asylum, L. R. 4 Chan. App. 146; Atty.-Gen. v. Hackney Local Board, L. R. 20 Eq. 626, 631.

[41] Morse v. City of Worcester, 139 Mass. 389, 391.

[42] 16 Am. & Eng. Enc. of Law, 1000.

[43] Kobbe v. Village of New Brighton, 45 N. Y. S. 777; Siefert v. City of Brooklyn, 101 N. Y. 136.

[44] Balt. & Pot. Ry. Co. v. Fifth Baptist Church, 108 U. S. 317; Penn. Ry. Co. v. Angel (N. J.), 7 Atl. Rep. 432; Taylor v. Ry. (W. Va.), 10 S. E. Rep. 29; Bohan v. Port Jervis Gas Light Co., 122 N. Y. 18, 29; McAndrews v. Collerd, 42 N. J. L. 189.

[45] Sawyer v. Davis, 136 Mass. 239, 243.

[46] 16 Am. & Eng. Enc. of Law, 1003. But it has been held that where a change of circumstances since the statute was passed, makes compliance therewith necessarily result in a nuisance, when it would not have so resulted at the time of passage, it will not be presumed that the legislature intended a nuisance to be created. Reg. v. Bradford Navigation Co., 13 W. Rep. 892.

[47] Atty.-Gen. v. Birmingham, 4 K. & J. 528, 540; Indianapolis Water Co. v. American Strawboard Co., 53 Fed. Rep. 970, 975, 57 Fed. Rep. 1000, 1004.

[48] See cases in note 9, and also Holsman v. Bleaching Co., 14 N. J. Eq. 335, 343; Woodyear v. Schaefer, 57 Md. 1, 12.

[49] Goldsmid v. Turnbridge Wells, L. R. 1 Chan. App. 349, 355.

[50] See cases in notes 9-16.

[51] Goldsmid v. Turnbridge Wells, L. R. 1 Chan. App. 349, 355; Atty.-Gen. v. Gee, L. R. 10 Eq. 131, 137; Morgan v. City of Binghampton, 102 N. Y. 500.

[52] Kuehn v. City of Milwaukee, 83 Wis. 583.

[53] Village of Dwight v. Hayes (Ill.), 37 N. E. Rep. 218, 220.

[54] Village of Dwight v. Hayes, *supra;* Dierks v. Comm. of Highways (Ill.), 31 N. E. Rep. 496, 501; Beach on Injunctions, Vol. II, § 1064.

issue until actual demonstration has shown a nuisance to exist.[55] Mere apprehension that such will be the case in two or three years, with increased use of the sewer, is not sufficient;[56] particularly when the distance of the party complaining from the outfall of the sewer,[57] or the possible use of purifying arrangements for the sewage,[58] make it doubtful whether any injury will occur. But if some degree of existing nuisance be shown, the fact that it is likely to continue and to increase with the growth of the city, may properly be considered.[59] The sewerage system of a large city, involving the health of its inhabitants and erected at a large expense, will not be suppressed for any trivial or fanciful reason,[60] but where it is clearly shown that a nuisance exists, neither the expense[61] to the city in constructing its sewers, nor the fact that its many inhabitants will be injured by their suppression,[62] is a valid defense; nor will the court concern itself as to how, or at what expense, the city is to abate the nuisance, or drain itself without sewers.[63] But as time may be needed to change the method of drainage, the court will listen to all proper suggestions on that head, and shape the final decree so as to give the city time to make the change.[64] It is immaterial that the stream is already somewhat polluted, or that others, however many, contribute to the pollution,[65] or that the new sewers built, or proposed to be built, merely increase the already existing pollution,[66] or that the best and most approved appliances are used,[67] or that the sewerage of the city by itself would not cause a nuisance,[68] or that, being purified, it only becomes a nuisance by coming in contact with other substances unlawfully deposited in the river by third parties.[69] In most jurisdictions it is, in the proper case, not only permissible, but usual, to join a demand for damages for past injury to the plea for an injunction against the further continuance of the nuisance.[70]

Special Damage.—Where, as in the case of the pollution of public waterways, the act of the city amounts to a public nuisance, no private citizen is entitled to bring an action at law, or suit in equity, unless he has sustained special damage, differing not only in degree, but in character, from that suffered by the general public. The best and most comprehensive statement of what constitutes special damage and what does not is that of Bigelow, C. J., in Wesson v. Iron Co.,[71] and particular attention is called thereto. In part he says: "The real distinction would seem to be this: That when the wrongful act is of itself a disturbance or obstruction only to the exercise of a common and public right, the sole remedy is by public prosecution, unless special damage is caused to individuals. In such case the act of itself does no wrong to individuals distinct from that done to the whole community. But when the alleged nuisance would constitute a private wrong by injuring property or health, or creating personal inconvenience and annoyance, for which an action might be maintained in favor of a

[55] Atty. Gen. v. Mayor of Kingston, 13 W. Rep. 888; Newark Aqueduct Co. v. City of Passaic (N. J.), 18 Atl. Rep. 106, 110; Morgan v. City of Binghampton, *supra*; Robb v. Village of LaGrange (Ill.), 42 N. E. Rep. 77; Atty.-Gen. v. Manchester, 2 Chan. Div. (1893) 87.

[56] Morgan v. City of Binghampton, *supra*.

[57] Newark Aqueduct Board v. City of Passaic (N. J.), 18 Atl. Rep. 106, 112.

[58] Atty. Gen. v. Mayor, etc. of Kingston, 13 W. Rep. 888, 892; Fletcher v. Bealey, L. R. 28 Chan. Div. 688.

[59] Goldsmid v. Turnbridge Wells, L. R. 1 Chan. App. 349, 354.

[60] Note 48, and cases *supra*.

[61] Atty.-Gen. v. Leeds, L. R. 5 Chan. App. 583, 594; Susquehanna Fertilizer Co. v. Malone, 73 Md. 268, 282.

[62] Atty. Gen. v. Birmingham, 4 K. & J. 528, 539; Atty.-Gen. v. Colney-Hatch Lunatic Asylum, L. R. 4 Chan. App. 146, 155.

[63] Atty.-Gen. v. Colney-Hatch Lunatic Asylum, L. R. 4 Chan. App. 157, 158; Atty.-Gen. v. Birmingham, 4 K. & J. 543. But see City of Richmond v. Tent (Ind.), 48 N. E. Rep. 610, 616.

[64] Boston Rolling Mills v. City of Cambridge, 117 Mass. 396, 401; Atty.-Gen. v. Colney-Hatch Lunatic Asylum, L. R. 4 Chan. App. 163.

[65] Newark Aqueduct Board v. City of Passaic (N. J.), 18 Atl. Rep. 106, 112; Indianapolis Water Co. v. American Strawboard Co., 57 Fed. Rep. 1000, 1003; Townsend v. Bell, 17 N. Y. S. 210; Barrett v. Greenwood Cemetery Assn. (Ill.), 42 N. E. Rep. 891; Atty.-Gen. v. Leeds, L. R. 5 Chan. App. 595; Atty.-Gen. v. Colney-Hatch Lunatic Asylum, L. R. 4 Chan. App. 155.

[66] Atty. Gen. v. Leeds, 18 W. Rep. 517, 518; Goldsmid v. Turnbridge Wells, L. R. 1. Eq. 161, L. R. 1 Chan. App. 349; Atty.-Gen. v. Acton Local Board, L. R. 22 Chan. Div. 221; Boston Rolling Mills v. City of Cambridge, 117 Mass. 396.

[67] Notes 9 and 19. And see Indianapolis Water Co. v. American Strawboard Co., 57 Fed. Rep. 1000, 1004; Susquehanna Fertilizer Co. v. Malone, 73 Md. 268, 276.

[68] Morgan v. City of Danbury (Conn.), 35 Atl. Rep. 499; Blair v. Deakin, 57 Law Times, 522; Thorpe v. Brumfit, L. R. 8 Chan. App. 650.

[69] Morgan v. City of Danbury, *supra*.

[70] Cases in note 9. See also Cedar Lake Hotel Co. v. Cedar Creek Hydraulic Co., 79 Wis. 297, 312; Beach on Injunctions, § 10.

[71] 13 Allen, 95.

person injured, it is none the less actionable, because the wrong is committed in a manner and under circumstances which would render the guilty party liable to indictment for a common nuisance." Thus, a fisherman who enjoys, with all others, the right to fish in Lake Michigan, has no right to enjoin a city from emptying its sewers therein;[72] nor can a water company, having no real riparian rights, but merely the right, with all others, to draw water, enjoin a city from draining into a river where the tide ebbs and flows.[73] In each of these cases, the interference was with merely a public right, common to all, and the only remedy a public one. There was no special damage, on precisely the ground that it has often been held that obstructions to navigation, or obstructions in highways, furnish no cause of action to parties who merely have the right, with all others, to pass along. But the injury to the property and health of the riparian owner, arising from the pollution of the water of the river adjoining his land, and the stenches and smells arising therefrom, is regarded as a special and peculiar injury, not merged in the common nuisance;[74] and this although others similarly situated have a like cause of action for their own special damage.[75] And it is no bar to the action that an indictment on behalf of the public could be had for the suppression of the public nuisance.[76] Where special damage is shown, the motive of the party suing in bringing the suit is immaterial.[77]

Estoppel and Other Defenses.—As already indicated, equity will not, except in the clearest cases, enjoin a city from erecting its sewerage system, preferring rather to wait until it has been demonstrated by actual use that a nuisance results from its operation. Such being the case, it is clear that the property owner specially injured is not estopped from enjoining such works as a nuisance by the mere fact that he entered no objection to their erection provided he did nothing to encourage it;[78] as, until the contrary is shown, he has a right to assume that no nuisance will result.[79] This is true, although the city goes to great expense in building the sewers to drain a large city.[80] Unlike a private nuisance,[81] no prescriptive right can be acquired to maintain a public nuisance, so as to bar an action by the party specially injured.[82] Unreasonable delay in bringing suit is, of course, a bar.[83] But sixteen years delay has been held no bar.[84] Delay may be justified by reliance upon the representations of the city that the sewers would soon cease to give trouble,[85] and delay is immaterial where the sewage of the city had not theretofore caused

[72] Kuehn v. City of Milwaukee, 83 Wis. 583.

[73] Newark Aqueduct Board v. City of Passaic (N. J.), 18 Atl. Rep. 106. To the point that riparian rights are necessary, see also Stockport Water Co. v. Potter, 3 H. & C. 300, 319, 326; Laing v. Whaley, 3 H. & N. 675. In England, it has been held that the grantee of the exclusive right to fish in a certain part of a river may mention an action for its pollution. Fitzgerald v. Firbank, L. R. 2 Chan. Div. (1897) 96. Such a case could hardly arise as to the public waterways of this country.

[74] Lind v. City of San Luis Obispo (Cal.), 42 Pac. Rep. 437; Edmondson v. City of Moberly (Mo.), 11 S. W. Rep. 990; City of Jacksonville v. Doan (Ill.), 33 N. E. Rep. 878, 880; Chapman v. City of Rochester (N. Y.), 18 N. E. Rep. 88; Haskell v. New Bedford, 108 Mass. 208, 215; Brayton v. Fall River, 113 Mass. 218, 227; Shoen v. Kansas City, 65 Mo. App. 134; Delephaine v. C. & N. W. Ry. Co., 42 Wis. 214, 230.

[75] Lind v. City of San Luis Obispo, *supra*; Shoen v. Kansas City, *supra*; Wesson v. Iron Co., 13 Allen, 95; Morris v. Graham (Wash.), 47 Pac. Rep. 752; Spokane Mill Co. v. Post, 50 Fed. Rep. 429, 432; Lansing v. Smith, 4 Wend. 9; Farmers' Mfg. Co. v. Ry. Co., 117 N. Car. 579.

[76] Haskell v. New Bedford, *supra*; Wesson v. Iron Co., *supra*; Barrett v. Greenwood Cemetery Assn. (Ill.), 42 N. E. Rep. 891; Hart v. Board of Chosen Freeholders (N. J.), 29 Atl. Rep. 490; Peck v. Elder. 3 Sandf. (N. Y.) 126.

[77] Townsend v. Bell, 17 N. Y. S. 210; Lippincott v. Lasher (N. J.), 14 Atl. Rep. 103.

[78] Chapman v. City of Rochester (N. Y.), 18 N. E Rep. 88; Village of Dwight v. Hayes (Ill.), 37 N. E Rep. 218; Matthews v. Gas Co. (Minn.), 65 N. W. Rep 947; Indianapolis Water Co. v. American Strawboard Co., 57 Fed. Rep. 1000, 1004. But even express permission to build, on the strength of which large sums of money are expended, works no estoppel in States where such parol license relating to lands is revocable after being acted on. Village of Dwight v. Hayes, *supra*. Nor would any permission justify exceeding the license given. Loughran v. City of Des Moines (Iowa), 34 N. W. Rep. 172; N. Y. Cent. Ry. v. City of Rochester, 127 N. Y. 591.

[79] Atty.-Gen. v. Leeds, L. R. 5 Chan. App. 583, 594.

[80] *Id.* and cases in note 58. But see Harley v. Merrill Brick Co. (Iowa), 48 N. W. Rep. 1000.

[81] 16 Am. & Eng. Enc. of Law, 996. But the prescriptive right to pollute a private waterway does not justify increasing the pollution. Middlesex Co. v. City of Lowell, 149 Mass. 509; Goldsmid v. Turnbridge Wells, L. R. 1 Chan. App. 349.

[82] Meiners v. Brewing Co., 78 Wis. 364; City of Bloomington v. Costello, 65 Ill. App. 407; Bowen v. Wendt (Cal.), 37 Pac. Rep. 149; Wood on Nuisances. § 727.

[83] Atty.-Gen. v. Leeds, *supra*; Wood on Nuisances, § 804.

[84] Atty.-Gen. v. Leeds, *supra*.

[85] Atty.-Gen. v. Birmingham, 4 K. & J. 528, 544.

a nuisance.[86] The fact that the nuisance existed before plaintiff acquired his property is no bar.[87] One has no right of action for pollution of a stream when he himself contributes to the pollution.[88] But the fact that a part of his damage is due to a separate and independent nuisance maintained by him is not a bar,[89] nor is he barred by his failure to take precautions against the nuisance, the effects of which he could have avoided at slight expense.[90] Sometimes the plaintiff's private drain is connected with the sewer that causes the damage. Where the connection is made lawfully and under a permit from the city, the city is liable for damages due to negligence,[91] but perhaps not otherwise, unless the city requires such connection to be made.[92] But it has been held that a party whose private drain is connected with the city sewer that causes the nuisance has a right to sue for an injunction against the city.[93] But there can be no cause of action if the connection is unlawful,[94] although a formal permit from the city may not always be necessary.[95] It is no defense that the nuisance is caused by third parties connecting their drains with the city sewer,[96] nor that the sewer is partly upon private property, and could not be abated without trespass,[97] nor that the city has no jurisdiction over part of the sewer,[98] nor that it was paid for by assessments on the adjoining lot owners.[99]

Parties.—Two or more parties, each suffering special damage from the same nuisance, may unite as plaintiffs in a suit for injunction, although they are not joint owners of the property injured by the nuisance.[100] But the rule is otherwise in actions at law for damages.[101] In the case of tenants in common, any one or more of them may sue for an injunction.[102] When the nuisance is the result of the joint act of two or more parties, they may be sued together, or either may be sued separately, for the entire damage.[103] But where it is the result of two or more parties acting separately, each is liable only *pro rata* for the damage caused by his own act.[104] In such case they may be joined as defendants in a suit in equity for an injunction,[105] or enjoined separately,[106] but they cannot be joined as defendants in an action at law for damages.[107] Where, however, an injunction, as well as damages, is asked, the court, in a proper case, will grant the injunction, provided the plaintiff withdraws his demand for damages.[108]

W. W. ALLEN.

[86] Goldsmid v. Turnbridge Wells, L. R. 1 Chan. App. 349; Boston Rolling Mills v. City of Cambridge, 117 Mass. 396.

[87] 16 Am. & Eng. Enc. of Law, 234.

[88] Ferguson v. Firmenich Mfg. Co. (Iowa), 42 N. W. Rep. 448.

[89] Randolf v. Bloomfield (Iowa), 41 N. W. Rep. 562.

[90] Satterfield v. Rowan (Ga.), 9 S. E. Rep. 677; Paddock v. Somes (Mo.), 14 S. W. Rep. 746; Tenn. Coal Co. v. Hamilton (Ala.), 14 South. Rep. 167.

[91] City of Fort Wayne v. Coombs, 107 Ind. 75, 83; Daggett v. City of Cohoes, 7 N. Y. S. 882; Defer v. City of Detroit (Mich.), 34 N. W. Rep. 680; Livingstone v. City of Taunton (Mass.), 29 N. E. Rep. 635.

[92] Buckley v. City of New Bedford, 155 Mass. 64, 68.

[93] Bolton v. Village of New Rochelle, 32 N. Y. S. 442.

[94] Breuck v. City of Holyoke, 167 Mass. 258.

[95] Sheridan v. City of Salem, 148 Mass. 196.

[96] Stoddard v. Village of Saratoga Springs, 4 N. Y. S. 745, 127 N. Y. 261; Demby v. City of Kingston, 14 N. Y. S. 601, 133 N. Y. 538.

[97] Demby v. City of Kingston, *supra*; Stoddard v. Village of Saratoga Springs, *supra*; Netzer v. City of Crookstown (Minn.), 61 N. W. Rep. 21.

[98] Stoddard v. Village of Saratoga Springs, 4 N. Y. S. 753.

[99] Stoddard v. Village of Saratoga Springs, *supra*.

[100] Bushnell v. Robeson (Iowa), 17 N. W. Rep. 888, 890; Town of Sullivan v. Phillips (Ind.), 11 N. E. Rep. 300; First Nat. Bank v. Sarlls (Ind.), 28 N. E. Rep. 435; Peck v. Elder, 3 Sandf. (N. Y.) 126; Robinson v. Baugh, 31 Mich. 290; Beach on Injunctions, §§ 362, 363, 364.

[101] Hellams v. Switzer, 24 S. Car. 39.

[102] Mitchell v. Thorne, 134 N. Y. 536; Murray v. Hay, 1 Barb. Ch. 59; Lytle Water Co. v. Perdew, 65 Cal. 447.

[103] Sloggy v. Dilworth (Minn.), 36 N. W. Rep. 451, and cases cited; Grogan v. Pope Co. (Mo.), 3 W. Rep. 233.

[104] Chipman v. Palmer, 77 N. Y. 51; Martinowsky v. City of Hannibal, 35 Mo. App. 70.

[105] Lockwood Co. v. Lawrence, 77 Me. 297, collecting cases.

[106] Woodyear v. Schaefer, 57 Md. 1. Although the act of neither alone would amount to a nuisance. Lambton v. Mellish, 3 Chan. Div. (1894) 163.

[107] Lockwood v. Lawrence, *supra*; Shipman v. Palmer, *supra*.

[108] Blaisdell v. Stephens, 14 Nev. 17; Miller v. Highland Ditch Co., 87 Cal. 430. But see Sadler v. G. W. Ry. Co., 2 Q. B. (1895) 688. On this general subject, see City of Valparaiso v. Moffit (Ind.), 39 N. E. Red. 909.

AGENCY—DEATH OF PRINCIPAL.

DEWEESE v. MUFF.

Supreme Court of Nebraska, December 8, 1898.

When in good faith one deals with an agent within his apparent authority, in ignorance of the death of the principal, the estate of the principal will be bound in case the act to be done by the agent is not required to be performed in the name of the principal.

NORVAL, J.: On July 1, 1892, Catherine Muff executed a note, whereby she promised to pay to

the order of James E. Jones the sum of $2,000 on September 1st of the same year, with interest thereon at 7 per cent. per annum. The payee resided in England, but the note was delivered to him personally at Crete, Neb., at which time he stated in substance, to Mrs. Muff, in the presence of one J. H. Gruben, her business manager, that he would probably sell the note to C. C. Burr, of Lincoln, as he (Jones) was going to England, and desired to take the money with him, and that the maker should pay the note to Mr. Burr. The latter had been, and then was, the agent of Mr. Jones. Instead of selling the note, the payee, soon after it was given, indorsed the same in blank, and delivered the instrument to Mr. Burr, for collection. On September 19, 1892, Mrs. Muff paid $1,000 on the note to Mr. Burr; and on November 11, 1892, she paid him the balance due; and the instrument was at the time delivered to her, indorsed, "Paid Nov. 11th, 92. C. C. Burr." On October 16, 1892, James E. Jones died, leaving a will; and Jacob Bigler was duly appointed executor of his estate, and qualified as such. The executor repudiates the payment made to Mr. Burr on November 11th, claiming that the latter's authority to collect the note had been previously revoked by the death of Mr. Jones; and this action was brought to recover from Mrs. Muff the amount of said payment, as the balance alleged to be due on the note. The jury returned a verdict for the defendant, under a peremptory instruction of the court so to do; and error has been prosecuted from the judgment entered thereon. After the filing of the record in this court, Jacob Bigler died; and the action was revived in the name of Jasper C. Deweese, as executor *de bonis non* of the estate of James E. Jones, deceased.

It is disclosed that Mrs. Muff paid the amount due on the note to Mr. Burr in good faith, without any notice or knowledge whatsoever that he was not the owner of the paper, or that Mr. Jones, the payee, was dead. It is insisted that the court erred in directing a verdict for the defendant, because the death of Jones revoked the authority or power of Mr. Burr to receive from the maker payment of the obligation, although she was unaware of the death of the payee. Undoubtedly, the rule is that the death of a principal instantly terminates the agency. But it by no means follows that all dealings with the agent thereafter are absolutely void. Where, in good faith, one deals with an agent within his apparent authority, in ignorance of the death of the principal, the heirs and representatives of the latter may be bound, in case the act to be done is not required to be performed in the name of the principal. There is a sharp conflict in the authorities on the question, but it is believed that the better reasoned cases sustain the proposition stated, among which are the following: Ish v. Crane, 8 Ohio St. 520; *Id.* 13 Ohio St. 574; Cassidy v. McKenzie, 4 Watts & S. 282; Davis v. Lane, 10 N. H. 156; Dick v. Page, 17 Mo. 234; Moore v. Hall, 48 Mich. 143, 11 N. W. Rep. 844; 1 Am. & Eng. Enc. Law (2d Ed.), 1224.

We quote the following apposite language from the opinion in Ish v. Crane, 8 Ohio St. 520: "Now, upon what principle does the obligation, imposed by the acts of the agent after his authority has terminated, really rest? It seems to me the true answer is, public policy. The great and practical purposes and interests of trade and commerce, and the imperious necessity of confidence in the social and commercial relations of men, require that an agency, when constituted, should continue to be duly accredited. To secure this confidence, and consequent facility and aid to the purposes and interests of commerce, it is admitted that an agency, in cases of actual revocation, is still to be regarded as continuing, in such cases as the present, toward third persons, until actual or implied notice of the revocation. And I admit that I can perceive no reason why the rule should be held differently in cases of revocation by mere operation of law. It seems to me that in all such cases the party who has by his own conduct purposely invited confidence and credit to be reposed in another as his agent, and has thereby induced another to deal with him in good faith, as such agent, neither such party nor his representatives ought to be permitted, in law, to gainsay the commission of credit and confidence so given to him by the principal. And I think the authorities go to that extent. See Pickard v. Sears, 6 Adol. & E. 469. The extensive relations of commerce are often remote as well as intimate. The application of this doctrine must include factors, foreign as well as domestic, commission merchants, consignees and supercargoes, and other agents remote from their principal, and who are required for long periods of time, not unfrequently, by their principal, to transact business of immense importance, without a possibility of knowing perhaps even the probable continuance of the life of the principal. It must not unfrequently happen that valuable cargoes are sold and purchased in foreign countries by the agent, in obedience to his instructions from his principal, after and without knowledge of his death. And so, too, cases are constantly occurring of money being collected and paid by agents, under instructions of the principal, after and without knowledge of his death. In all these cases, there is certainly every reason for holding valid and binding the acts so done by the agency which the principal had, in his life, constituted and ordered, that there would be to hold valid the acts of one who had ceased to be his agent, by revocation of his power, but without notice to the one trusting him as agent."

In the case at bar it was not necessary for the agent, Mr. Burr, to collect or receive the money in the name of Mr. Jones, nor did he do so. The defendant was justified in paying the money under the circumstances disclosed by the evidence. The note was properly indorsed by the payee in blank, and it was at the time in possession of Mr. Burr. Payment to him, without knowledge that the note was held for collection, or that the owner was dead, discharged the debt. Davis v. Associa-

tion, 20 La. Ann. 24; 18 Am. & Eng. Enc. Law, 190; Edwards v. Parks, 60 N. Car. 598; Loomis v. Downs, 26 Ill. App. 257; Stoddard v. Burton, 41 Iowa, 582; Boyd v. Corbitt, 37 Mich. 52; Johnson v. Hollensworth, 48 Mich. 143, 11 N. W. Rep. 843. In the case last cited, a negotiable note was indorsed by the payee, and delivered to an agent for collection. Subsequently the payee died. It was held that the authority to collect was not thereby revoked. A verdict for the defendant was properly directed in the case at bar. The conclusion reached obviates an examination of the instructions tendered by the plaintiff, and refused by the court. The judgment is affirmed.

Ryan, C., not sitting.

NOTE.—It is a rule of law that the death of the principal terminates the powers of the agent. Long v. Thayer, 150 U. S. 520; McDonald v. Black, 20 Ohio, 185; McClaskey v. Barr, 50 Fed. Rep. 712; Weber v. Bridgman, 113 N. Y. 600; Clayton v. Merrett, 52 Miss. 353. Among the reasons assigned is, that it is absurd to consider a person as an agent when he has no principal. A deed made by an agent after the death of his principal is void. Kern's Estate, 176 Pa. St. 373; Tuttle v. Green (Ariz.), June, 1897, 48 Pac. Rep. 1009; Ish v. Crane, 8 Ohio St. 520. Nor under such circumstances is the payment to an agent of securities good, though the agent has possession of the securities. Weber v. Bridgman, 113 N. Y. 600. Nor can an agent collect rents for his principal after his death. Farmers', etc. Co. v. Wilson, 139 N. Y. 284. The death of a surety revokes the power of the principal debtor to make an agreement for the extension of the time of payment of the debt so as to bind the surety, though he had a contract with the surety giving him such power. Home N. Bank v. Wateman. 134 Ill. 461. It is held, that the death of one partner in a firm terminates the power of an agent of the firm, and the death of a joint owner terminates an agency for such joint owners, since such death dissolves the partnership or the joint ownership as the case may be. Long v. Thayer, 150 U. S. 520. A partner being an agent of the partnership cannot contract for it so as to bind the estate of a deceased partner. Marlett v. Jackman, 3 Allen, 287. The act of an agent in drawing the money of a partnership out of a bank after the death of a partner was held to be valid, partially because the firm was considered to continue for purposes of settlement and liquidation, and partly because the surviving partner, in whom the assets vested, did not complain of such action. Bank v. Vanderhorst, 32 N. Y. 553. On the other hand where an agency is given to two partners, the death of one of them terminates the agency. Johnson v. Wilcox, 25 Ind. 182. It is admitted, as is decided in the principal case, that a party may pay his note, to one who holds it properly indorsed, though in fact such holder received it as agent for a principal, who has since died; but in such cases the debtor has a right to presume in the absence of evidence to the contrary that the holder is the owner of the note. Moore v. Hall, 48 Mich. 143; Stoddard v. Burton, 41 Iowa, 582; Loomis v. Downs, 26 Ill. App. 257; Story on Prom. Notes (7th Ed.), 528, 529, § 381. Where, however, an agency is coupled with an interest, it survives the death of the principal. Weber v. Bridgman, 113 N. Y. 600. Such agency is coupled with an interest when property in the thing, which is the subject of the agency or power, is vested in the person, to whom the agency or power is given, so that he may deal with it in his own name as a principal in pursuance of powers which limit his estate. Oregon, etc. Bank v. American M. Co., 35 Fed. Rep. 22; Hunt v. Rousmanier, 8 Wheat. 174. If, however, the exercise of the agency at its creation is expressly limited in its exercise to the life of the principal, then it expires at his death, though it is coupled with an interest. Staples v. Bradbury, 8 Me. 181. Commissions on rents collected, or on sales made, do not create agencies coupled with an interest. Oregon, etc. Bank v. American M. Co., 35 Fed. Rep. 22; Farmers', etc. Co. v. Wilson, 139 N. Y. 284.

Exceptions to Rule.—A vast amount of the business of the world is done through agents; principals are often separated from their agents by thousands of miles; large transactions are necessarily concluded in ignorance as to whether at that moment a principal therein is still living. In such cases a rule that the power of an agent terminates at the instant of the death of his principal is bound to produce great hardship and often injustice. Clayton v. Merritt, 52 Miss. 353. It has been said that one who contracts with an agent, knowingly assumes the risk that the agency may terminate by death without any notice to him (Farmers', etc. Co. v. Wilson, 139 N. Y. 284); but since, in commercial nations, acting through agents is unavoidable, parties are actually compelled to take such risks. Some courts have recognized the impolicy of the rule, yet have felt constrained to follow it, asserting that it was too firmly established to be overthrown by the courts. Travers v. Crane, 15 Cal. 12. It has been frequently said that the case of Cassidy v. McKenzie, 4 Watts & S. 282, was the only decision which in any way departed from this rule. Travers v. Crane, 15 Cal. 12; Clayton v. Merritt, 52 Miss. 353; 1 Am. Lead. Cas. 588. There can be no doubt that the weight of authority is overwhelmingly in favor of the rule to its fullest extent, but there are some courts which agree with the principal case in trying to establish some exceptions to the rule. They argue that the death of the principal only terminates the power of the agent as to acts which must necessarily be done in the name of the principal; as to all other acts, in pursuance of the agency, done in good faith and in ignorance of the death of the principal, the estate of the principal is bound. An agent's bargain to sell his principal's land was held to be binding, he not being called on to make a deed. Ish v. Crane, 8 Ohio St. 520. Payment of debt to agent after the principal's death bound the latter's estate. Cassidy v. McKenzie, 4 Watts & S. 282. Where a banker, at the request of the principal, made advances to his agent on his business, and received collaterals as security, he was protected as to the claim of the principal's representative for the money received by him in payment of a collateral, which had been deposited with him by the agent, who was then unaware of the death of the principal. The court said that to hold otherwise would shock the sense of justice of every man. Dick v. Page, 17 Mo. 234. Where an agent contracted under his powers as agent with B to ship goods from time to time to a certain store belonging to the principal, and ordered certain goods by a letter mailed one day before the death of the principal, who lived in a distant State, and the letter was received and the goods were shipped in a reasonable time thereafter, the estate of the principal was held to be bound by the contract. Garrett v. Trabue, 82 Ala. 227; Davis v. Davis, 93 Ala. 173. In none of such cases can the agent be held liable personally on the contract, for the credit is given to the principal and the party is fully informed as to the power of the agent. Smout v. Ilbery, 10 Mees. & W. 1; Blade v.

Free, 9 Barn. & Cres. 167; Carriger v. Whittington, 26 Mo. 311. Under the civil law, all acts of an agent in pursuance of his agency, done in good faith, after the death of his principal, but before notice to him thereof, are binding on the estate of the principal. 2 Kent's Com. (14th Ed.), 1059, star page 646; Wharton on Agency, 63, § 104. Judge Story doubts whether the common law deserves the reproach that it allows no exception to this rule. Story on Agency, § 495. In a very long decision, in which the authorities were very fully reviewed, it was held that the rule only applied where the agent must necessarily act in the name of the principal. However, this was the decision of a divided court. Ish v. Crane, 8 Ohio St. 520, 13 Ohio St. 574. Georgia, Maryland, South Carolina and Louisiana, and perhaps other States, have passed statutes to protect parties who deal with agents in ignorance of the deaths of their principals.

St. Louis, Mo. S. S. MERRILL.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions, and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

1. ADVERSE POSSESSION.—Cutting timber on lands from time to time, and paying the taxes thereon, is not adverse possession, within Mill. & V. Code, § 3460, barring claims to lands against persons in adverse possession thereof for seven years.—CALL v. COZART, Tenn., 48 S. W. Rep. 312.

2. ADVERSE POSSESSION—Color of Title.—A decree in chancery, declaring that certain described lands, title to which is in the defendant in the case, shall be held by the defendant in trust for the sole and separate use of the plaintiff, is admissible in evidence as color of title, upon which the plaintiff and those claiming under him may base a claim to a prescriptive title.—WARDLAW v. MCNEILL, Ga., 31 S. E. Rep. 785.

3. ADVERSE POSSESSION — Running of Statute.—All that is necessary to render possession of lands adverse, so as not to set the statute of limitations in motion, is that the disseisor enter and take possession with the intention of holding the lands for himself to the exclusion of all others.—CARPENTER v. COLES, Minn., 77 N. W. Rep. 424.

4. APPEAL—Voluntary Nonsuit.—Under Rev. St. 1889, § 2084, authorizing a plaintiff to take a nonsuit at any time before final submission of the cause, a nonsuit taken by plaintiff on a mere expression of opinion by the court that, if the cause be submitted, the finding will be against plaintiff, and before any adverse rulings are made, is voluntary, and cannot be reviewed on plaintiff's appeal.—GREENE COUNTY BANK v. GRAY, Miss., 48 S. W. Rep. 447.

5. ASSIGNMENT FOR BENEFIT OF CREDITORS.—Laborers who work in a coal mine after a sale thereof under order of court, by an assignee for the benefit of creditors, are not entitled to preference for their claims out of the proceeds of such sale in the hands of the assignee.—HAW v. BURCH, Iowa, 77 N. W. Rep. 461.

6. ATTACHMENT — Debt not Due.—Where an action is begun on a debt not due, and an attachment is sued out under the provisions of section 3308, Comp. Laws Utah 1888, the complaint, to constitute a proper pleading, must contain, in addition to the allegations of fraud necessary to be made in the affidavit for attachment, a statement of the facts constituting the fraud. Fraud cannot be alleged in general terms, but the facts constituting the fraud must be set out.—H. B. CLAFLIN CO. v. SIMON, Utah, 55 Pac. Rep. 376.

7. ATTORNEY AND CLIENT — Conspiracy to Defraud.—An attorney, having a contract for part of land in litigation, purchased an outstanding title at sheriff's sale without authority from his client, to whom he offered to give the benefit of his purchase on payment of his *pro rata* part, which he refused. The court adjudged that the client should pay his part of the sum paid for the sheriff's deed. Held error, as the client had a right to elect to treat the purchase as made for their joint benefit, but the court could not compel him to do so.—MORRISON v. THOMAS, Tex., 48 S. W. Rep. 500.

8. BAILEES — Liability for Insurance.—Defendants, doing general mercantile business in agricultural products, who, as part of their business, had an arrangement with a warehouseman, and placed produce shipped them in his warehouse, placed therein produce shipped by complainant at their invitation, and on their agreement to hold and store it till complainant was ready to sell it, and then to give the market price therefor, and, having made an advancement to complainant on the produce, insured it. Held that, defendants having recovered on the insurance more than the amount of the advancement, complainant was entitled to the benefit thereof.—MCDONALD v. PALMER, Tenn., 48 S. W. Rep. 338.

9. BANKS—Savings Bank—Contracts.—A savings bank contracted with plaintiff to act as plaintiff's agent at a public sale to take notes of purchasers with approved security, and retain and collect such notes. Held, that since the contract was *ultra vires* of the bank, and beyond its apparent authority, it was not liable to plaintiff for loss resulting from the negligence of its agent in taking a note on which the indorsement was forged.—WILLETT v. FARMERS' SAV. BANK OF VICTOR, Iowa, 77 N. W. Rep. 519.

10. BENEVOLENT SOCIETY — Life Insurance.—Where the holder of a benefit certificate agrees that the board of control of the association may annul it when, on investigation, they find it to have been procured by misrepresentation or fraud, and also when he has become addicted to vices in any form, so that in the board's opinion his life would thereby be shortened, and the risk become extrahazardous, he does not thereby waive the right to notice of a proceeding to annul it.—SUPREME LODGE K. P. OF THE WORLD v. TAYLOR, Ala., 24 South. Rep. 247.

11. BILLS AND NOTES — Action — Estoppel.—That the maker of a promissory note, after its maturity, addresses to the payee one or more letters in which he asks for indulgence, and promises to pay the note if its collection is not pressed, will not operate to estop him from subsequently setting up the defense of partial failure of consideration, notwithstanding the facts upon which this defense is based were well known to him at the time he wrote the payee to the effect stated.—PEARSON v. BROWN, Ga., 31 S. E. Rep. 746.

12. BILLS AND NOTES — Obligation of Payee to Guarantors.—A payee of a note secured by a chattel mortgage is not bound to protect guarantors from loss by

resorting to the mortgaged property, which never was placed in his custody.—BLANDING v. WILSEY, Iowa, 77 N. W. Rep. 508.

18. BILLS AND NOTES—Payment—Agency.—The mere fact that a note is made payable at a certain place does not of itself confer any agency upon the owner or occupant of that place to receive payment in behalf of the payee. In order to make such owner or occupant the payee's agent to receive the money, the paper must be indorsed to or lodged with him for collection.—DWIGHT v. LENZ, Minn., 77 N. W. Rep. 546.

14. BILLS AND NOTES—Pledge.—A bank held notes executed by a principal and three sureties. Principal and two of the sureties gave the bank another note, and assigned as collateral a note executed by the principal to such sureties, and indorsed by the latter. It was agreed that, if the parties should come under any other liability to the bank, the proceeds of the collateral note might be applied by the bank as it deemed best. Subsequently the bank became the owner of a note against the principal alone. The proceeds of the collateral note were applied by the bank partly to the payment of such latter note, instead of those on which the sureties were jointly liable. Held that, as the collateral note was payable to the sureties, it presumptively belonged to them, and the bank had no authority to apply its proceeds on notes on which they were not liable.—FIRST NAT. BANK OF ELIZABETH CITY v. SCOTT, N. Car., 31 S. E. Rep. 819.

15. BUILDING AND LOAN ASSOCIATIONS—Insolvency.—A borrowing stockholder, who is an incorporator in an insolvent building and loan association, cannot be allowed the amounts paid into the association in discharge of his indebtedness, until the amount of defalcation and expenses of winding up the concern are paid.—WILLIAMS v. MAXWELL, N. Car., 31 S. E. Rep. 821.

16. BUILDING AND LOAN ASSOCIATIONS—Right to Vote.—In a building and loan association, where each shareholder is entitled to one vote for officers, every voter must be the holder of at least one share of the stock of the association.—IN RE PROVIDENT BLDG. & LOAN ASSN. OF PASSAIC COUNTY, N. J., 41 Atl. Rep. 952.

17. BUILDING AND LOAN ASSOCIATIONS—Usury.—In an action of foreclosure brought by a building and loan association incorporated under the laws of a State other than Nebraska, the rights of plaintiffs with respect to interest are governed by chapter 44, Comp. St.; and if, for the use of the money sought to be collected, the proofs, upon proper issues, show that more than 10 per cent. interest per annum has been contracted for or received, under any pretense whatever, the penalties prescribed by said chapter 44 for contracting for or receiving usury should be enforced.—NATIONAL MUT. BLDG. & LOAN ASSN. OF NEW YORK v. KEENEY, Neb., 77 N. W. Rep. 442.

18. BUILDING AND LOAN ASSOCIATIONS — Usury—Statute of Tennessee.—Under the Tennessee statute governing building and loan associations, which permits associations formed thereunder to sell their loans, in open meetings, to the stockholder bidding the highest premium, which premium is not to be considered as interest, within the general usury law, it is only a premium bid in open competition which is lawful; and where an association made its loans privately, without such competition, exacting a fixed premium, whether determined by its by-laws or in disregard of their provisions, such premium renders its loans usurious.—DOUGLASS v. KAVANAUGH, U. S. C. C. of App., Sixth Circuit, 90 Fed. Rep. 373.

19. CARRIERS OF GOODS—State Regulation of Rates.—A State having lawful authority, either by legislative enactment or through a commission, to establish rates and fares for the carriage of freight and passengers between points within its limits, rates and fares so established are *prima facie* lawful and valid, and, to authorize a court to interfere with their enforcement, it must be shown beyond a reasonable doubt that such enforcement will result in depriving individuals or corporations affected thereby of their property without due process of law or of the equal protection of the laws.—CHICAGO, M. & ST. P. RY. CO. v. TOMPKINS, U. S. C. C., D. (S. Dak.), 90 Fed. Rep. 363.

20. CARRIERS OF PASSENGERS—Tickets—Ejection from Trains.—There can be no recovery for the ejection from a train of one who presented an expired limited ticket, the limit of which had not been waived, and who refused to pay fare; such person being a trespasser.—TREZONA v. CHICAGO G. W. RY. CO., Iowa, 77 N. W. Rep. 486.

21. CHATTEL MORTGAGE—Validity — Assignment for Creditors.—When a chattel mortgage has been signed and delivered in good faith, but without being acknowledged by the mortgagor, what he may afterwards do, or what the mortgagee thereafter may learn in regard to the mortgagor's assignment for the benefit of creditors on the following day, could not affect its validity.—IN RE WINDHORST, Iowa, 77 N. W. Rep. 513.

22. CONSTITUTIONAL LAW—Retrospective Laws—Unrecorded Deeds.—Act 1895, ch. 38, amending Code 1858, § 2763, so as to preclude the vesting of title by adverse possession in one holding under an unrecorded deed, though his deed was executed before the enactment of the chapter, is not repugnant to Const. U. S. art. 1, § 10, and Const. art. 1, § 20, prohibiting the impairment of the obligation of contracts.—SNIDER v. BROWN, Tenn., 48 S. W. Rep. 377.

23. CONSTITUTIONAL LAW—Sale of Cigarettes.—Cigarettes, being harmful and deleterious to health, are not legitimate articles of commerce; hence Acts 1897, ch. 30, § 1, prohibiting the selling or importing for sale of cigarettes, is not, by prohibiting their sale in original packages, repugnant to the commerce clause of the United States constitution.—AUSTIN v. STATE, Tenn., 48 S. W. Rep. 385.

24. CONSTITUTIONAL LAW—Special Assessments for Public Improvements.—The only just basis upon which special assessments for public improvements can rest is that of special benefits to the property taxed; and the exaction from the owner of private property of the cost of such an improvement, in substantial excess of the special benefits accruing to him, is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation.—VILLAGE OF NORWOOD v. BAKER, U. S. S. C., 19 S. C. Rep. 187.

25. CONTRACT — Construction.—A contract between plaintiff and defendant, under which the former furnished money to the latter, to be, and which was, used in a certain mercantile business, construed. Held, that under its provisions defendant occupied a *quasi* trust relation as to plaintiff and in the care and use of said money.—MAXFIELD v. SEABURY, Minn., 77 N. W. Rep. 555.

26. CONTRACT — Reformation — Mutual Mistake.—Where, by inadvertence and mutual mistake, a written contract is made to express a meaning not intended and never suggested by either party, and at variance with the practical construction of it by both parties, the contract will be reformed and corrected so as to comply with the original agreement and practical construction of the parties.—GRIFFIN v. SALT LAKE CITY, Utah, 55 Pac. Rep. 383.

27. CORPORATIONS—Assignments for Creditors—Preferences.—Where a corporation, in making an assignment for the benefit of creditors, prefers certain *bona fide* indebtedness, evidenced by notes upon which one of its officers, a minority stockholder, was indorser, and it appears from the evidence that the result would have been the same even if such indorser had voted against the preference or the assignment, such preference does not constitute actual or legal fraud.—NATIONAL BANK OF THE REPUBLIC v. GEORGE M. SCOTT & CO., Utah, 55 Pac. Rep. 374.

28. CORPORATIONS—Mortgages—After-acquired Property.—An after-acquired property clause in a mortgag

given by a corporation attaches to property to which the mortgagor subsequently acquires either the legal or equitable title, but subject to the limitation that the mortgagee is not a purchaser for value as to such property, and can take by way of lien no greater interest than that acquired by the mortgagor itself; and his lien is subject to all known liens or equities, valid against the mortgagor, which arises in the act of purchase or acquisition, and which qualify the scope and extent of its ownership.—HARRIS v. YOUNGSTOWN BRIDGE CO., U. S. C. C. of App., Sixth Circuit, 90 Fed. Rep. 322.

29. CORPORATIONS—Mortgage Executed Without Authority.—A mortgage executed in the name of a corporation, by its officers, without authority from the board of directors, is void.—BELL & COGGESHALL CO. v. KENTUCKY GLASS WORKS CO., Ky., 48 S. W. Rep. 440.

30. CORPORATIONS — Officers — Contracts.—A stockholder in a corporation, and acting as its president, may enter into a salary contract for his services with it; but he cannot use his position when making such contract to his own advantage, or to the disadvantage of the corporation; nor can he bind it to pay him a greater salary than his services are reasonably worth; and a contract of this kind between such president and the acting secretary and treasurer of the corporation will be scrutinized with great care.—CHURCH v. CHURCH CEMENTICO CO., Minn., 77 N. W. Rep. 548.

31. CORPORATIONS—Rights of Stockholders—Injunction.—The holders of after-acquired stock may enjoin the ratification of an illegal transfer of corporate property, the former owners of the stock not having participated in the transaction.—FORRESTER v. BOSTON & M. CONSOL. COPPER & SILVER MIN. CO., Mont., 55 Pac. Rep. 353.

32. COURTS—State Courts—Jurisdiction—Attorney.—A State court has no jurisdiction to rule an attorney at law for failure to pay over to his client money collected on process from a federal court.—WILKINSON COUNTY v. LINDSEY, Ga., 31 S. E. Rep. 792.

33. CRIMINAL LAW—Assault with Intent to Commit Rape.—Under Code 1873, § 3873, providing that, "if any person assault a female with intent to commit rape, he shall be punished," etc., to sustain a conviction of an assault with intent to commit rape on a female under the age of consent, defendant need not have known that she was under such age.—STATE v. SHERMAN, Iowa, 77 N. W. Rep. 461.

34. CRIMINAL LAW—Grand Jury—Civil Rights.—Where a negro is indicted by a grand jury, and it appears in its organization the negro race was discriminated against, the indictment would be violative of the fourteenth amendment of the constitution of the United States, granting equal protection of the laws to all citizens.—CARSER v. STATE, Tex., 48 S. W. Rep. 508.

35. CRIMINAL LAW—Right of State to Appeal.—Pen. Code, § 2273, subd. 1, which confers on the State the right to appeal from a judgment for defendant on demurrer to the indictment or information, does not authorize an appeal by the State from such judgment on a demurrer to a complaint, under Const. art. 3, § 8, providing that criminal offenses of which justices' courts have jurisdiction shall be prosecuted by complaint, and that those of which district courts have exclusive original jurisdiction shall be prosecuted by information or indictment.—STATE v. MORRIS, Mont., 55 Pac. Rep. 360.

36. CRIMINAL TRESPASS—Evidence.—In a trial on an indictment which charges the defendant with having committed an act of trespass on the lands of J M and E F M, it is error to charge the jury that they would be authorized to convict the defendant on proof that the trespass was committed by him on the land of J M or E F M.—EUBANK v. STATE, Ga., 31 S. E. Rep. 741.

37. DAMAGES—Value—Evidence.—The actual value of household goods and wearing apparel in use by a family, based on their cost, condition and age, and not their market value, is the measure of damages for their burning through negligence.—MCMAHON v. CITY OF DUBUQUE, Iowa, 77 N. W. Rep. 517.

38. DEEDS—Ancient Deed.—Although a deed purports to be more than 30 years old, and has the appearance of genuineness on inspection, it may nevertheless, after having been introduced in evidence, be shown by any competent evidence to be in fact a forgery.—ALBRIGHT v. JONES, Ga., 31 S. E. Rep. 761.

39. DEEDS — Conditions Subsequent.—A grantee's breach of a condition subsequent contained in the deed of land, to maintain a fence, in that some of the fence was burned and not replaced, is waived by the successor to the grantor's interest, where he afterwards lays down a part of the fence for the purpose of hauling over it, so that his immediate grantee can rely only on the breaches occurring after he became owner.—BONNIWELL v. MADISON, Iowa, 77 N. W. Rep. 530.

40. DEED OF TRUST—Sale of Property by Trustee.—A purchaser at a trustee's sale under a trust deed, in an action of ejectment against the maker of the trust deed, need not deraign title, as the parties claim from a common source.—SMITH v. TURNER, Tenn., 48 S. W. Rep. 396.

41. DESCENT AND DISTRIBUTION—Death of Wife.—During the lifetime of a married woman her real estate was sold on execution under a judgment against her. There was no redemption from this sale. Subsequently the women died, leaving her husband surviving her. Under the doctrine of Dayton v. Corser, 51 Minn. 406, 53 N. W. Rep. 717, one undivided third of this property descended, under the statute, to the surviving husband, unaffected by the execution sale on the judgment against his wife. Held, that this third descended to the husband, "subject in its just proportion, with the other real estate, to the payment of such debts (of the wife) as are not paid from the personal estate," as provided in Gen. St. 1894, § 4471.—DAYTON'S ESTATE v. JOHNSON, Minn., 77 N. W. Rep. 421.

42. DOWER—Homestead—Mortgage.—A widow can be reimbursed out of the personalty of an insolvent estate for her homestead and dower in the only realty her husband died possessed of, which was lost under a mortgage in which she waived homestead and dower, and which was foreclosed before the administrator had sufficient assets to protect her dower; and this though she did not assert her right thereto until after the foreclosure.—YOE v. SANSOM, Tenn., 48 S. W. Rep. 317.

43. ELECTION OF REMEDIES—Inconsistent Defenses.—Under Code 1873, § 2655, authorizing defendant to set forth as many defenses or counterclaims as he has, and section 2710, authorizing the stating of inconsistent defenses in the same pleading, defendant in an action for goods sold and delivered may, after a plea of a rescission and tender back of the goods has been held bad on demurrer, amend by pleading a breach of a warranty of the goods, the plea of rescission not being an election to abandon the contract.—THORSAN & CASSIDY CO. v. BAKER, Iowa, 77 N. W. Rep. 510.

44. ESTOPPEL—Defective Deed.—Where a man, after conveying property through a third party to his wife, took and recorded a power of attorney from her, authorizing him to manage the property as her agent, under which he made leases in her name, and during the remaining 30 years of his life many times admitted, and never denied, her title to the property, his devisees are estopped from denying the legal sufficiency of the deeds by which the title was conveyed to her.—ROBB v. DAY, U. S. C. C. of App., Sixth Circuit, 90 Fed. Rep. 337.

45. EVIDENCE—Secondary Evidence.—To justify the admission of secondary evidence as to the contents of a lost deed, it must be shown, not only that such a deed once existed, but also that it was properly executed.—SMITH v. SMITH, Ga., 31 S. E. Rep. 762.

46. EXECUTION SALE—Entry of Bid.—A purchaser at a judicial sale must comply with his bid, whether the property offered for sale is the property of the defend-

ant in execution or not. It follows, therefore, that, where such purchaser is the plaintiff in execution, the sheriff will, upon a proper proceeding by the defendant in execution, be compelled to enter the amount of the bid as a credit upon the execution.—PINKSTON v. HARRELL, Ga., 31 S. E. Rep. 808.

47. FEDERAL COURTS—Following State Decisions.—The rule restated that a federal court should lean toward a decision of the highest court of a State declaring a State statute penal in its nature, the question being peculiarly local, though it is not concluded thereby.—PERKINS v. BOSTON & A. R. Co., U. S. C. C., D. (Mass.), 90 Fed. Rep. 321.

48. FRAUDULENT CONVEYANCES—Conveyance to Wife.—A wife, having title to the homestead, and her husband being solvent, consented to a sale thereof upon the promise of her husband that the proceeds should be used to build a house on other lands then owned by her. After the house was built and paid for by the husband, he became insolvent. Held, that a creditor who became such after the house was paid for could not complain that the transaction was fraudulent.—EVERIST v. PIERCE, Iowa, 77 N. W. Rep. 508.

49. FRAUDULENT CONVEYANCES—Petition to Set Aside.—Petition of creditors to set aside a mortgage as fraudulent should show that the debtor's property is not sufficient, over and above the mortgage, to satisfy the debts.—HILL v. DENNENY, Iowa, 77 N. W. Rep. 472.

50. GAMING—Wagers—Right to Recover.—One who wagered money cannot recover his share of the stakes from the stakeholder, whatever the outcome, unless, before payment to the other wagering party, the former repudiated the transaction and notified the stakeholder not to pay the money; and his recovery is defeated if he merely gave notice not to pay the wager until further notice.—TRENERY v. GOUDIE, Iowa, 77 N. W. Rep. 467.

51. HIGHWAYS — Establishment — Prescription.—Adverse use by the public for the period named in the statute of limitations will establish a highway by prescription, but the title will be confined to the very way traveled during the period, unless an attempt has been made by the proper authorities to erect a highway, when the extent of the title will be measured by the claim exhibited by the proceedings.—STATE v. AUCHARD, Mont., 55 Pac. Rep. 361.

52. INFANCY—Disaffirmance of Contract.—Where one acting for himself and others purchased land, and gave his note as trustee therefor, the others assenting, taking the deed to himself as trustee for convenience in reconveying, as one of them was a minor, the latter cannot escape liability because of infancy, he not disaffirming until sued five years after majority, and in the meanwhile exercising his ownership over the land.—MISSION RIDGE LAND CO. v. NIXON, Tenn., 48 S. W. Rep. 405.

53. INJUNCTION—Commission of Crime.—Equity has no jurisdiction, upon the petition of individuals, to interfere in matters merely criminal, or to enjoin any one from the commission of a crime, when it does not appear that the acts complained of affected any property rights of the petitioners.—O'BRIEN v. HARRIS, Ga., 31 S. E. Rep. 745.

54. INJUNCTION—Judgment.—In a suit to enjoin the use of another's land, defendant is estopped from asserting a right to use it under a license, evidence of which had been admitted and considered no defense under the general issue in a prior action of ejectment, as the judgment would conclusively settle the rights of the parties under the license, though ordinarily evidence of such a license is inadmissible under the general issue.—DELAWARE, L. & W. R. Co. v. BRECKENRIDGE, N. J., 41 Atl. Rep. 966.

55. INSURANCE—Actions—Pleading.—A waiver of a condition of an insurance policy against additional exposures, without consent, must, in an action on the policy, be pleaded.—MCCOY v. IOWA STATE INS. CO., Iowa, 77 N. W. Rep. 529.

56. INSURANCE—Change of Title.—Insured made a contract to sell the property, which was to stand as a bond for a deed, but upon which no payment was made nor possession delivered. A clause provided that either party might recede from the contract on payment of $500 as liquidated damages. Held, that there was no such change of title or ownership as would avoid the policy.—PRINGLE v. DES MOINES INS. CO., Iowa, 77 N. W. Rep. 521.

57. INSURANCE POLICY—Payment of Premium.—It is not essential to the validity of a policy of fire insurance, issued in renewal of one previously taken out by the insured, that he should pay in cash the renewal premium, provided the agent of the company, with its express or implied assent, himself pays, or undertakes to become responsible to it for, such premium, in order that credit may be extended to the insured. Nor, under such circumstances, is it necessary that there should be manual delivery of the policy to the insured before a loss by fire occurs, where the policy has actually been issued by the company, and is simply retained by the agent for his individual protection until reimbursed by the insured.—FIREMAN'S FUND INS. CO. v. PEKOR, Ga., 31 S. E. Rep. 779.

58. JUDGMENTS—Enforcement.—A party recovered a judgment and issued execution. A forthcoming bond was given, and subsequently forfeited. Afterwards the judgment debtor conveyed certain of his real estate. A decree was entered subjecting his remaining land to the payment of the judgment, and, if insufficient, then the land conveyed to the grantee was to be sold to satisfy the balance. Held, that the decree was not prejudicial to grantee, since, if the sureties on the forthcoming bond had paid the judgment, they would have been subrogated to the rights of the judgment creditor, and to his lien on the real estate conveyed.—ROBER v. FERGUSON, Va., 31 S. E. Rep. 818.

59. JUDGMENTS—Liens.—A recorded judgment does not create a lien on land which the debtor had bought, as an administrator, at a sale of his intestate's lands for division, where the alleged confirmation of the sale, and the conveyance thereunder before the payment of the entire purchase price, were void as to the heirs who had not been paid their respective shares of said purchase money, since the debtor has no legal title, nor a perfect equity, in that he had not paid the entire purchase money, which is necessary in order to authorize a levy under Code 1896, § 1890 (2892).—WASHINGTON v. BOGART, Ala., 24 South. Rep. 245.

60. JUDGMENTS—Purchaser Pendente Lite.—Where a suit has been brought by a creditor against his debtor, based upon a promissory note secured by a deed to land, in which the plaintiffs seek not only to obtain a general judgment against the debtor, but also to enforce his special lien upon the land arising by virtue of his security deed, a purchaser from the defendant pending the litigation is affected by the final judgment rendered in the case; and where the final verdict and judgment in the case sets up a special lien upon the property, and thus sustains the validity of the deed set forth in the petition, such purchaser cannot attack the deed for usury.—SWIFT v. DEDERICK, Ga., 31 S. E. Rep. 788.

61. JUDICIAL SALES—Agreement not to Bid.—One who has an existing interest in property to be sold at a public sale may, for the protection of such interest, lawfully agree not to bid at the sale.—DE BAUN v. BRAND, N. J., 41 Atl. Rep. 958.

62. LIEN—Sawmill — Foreclosure.—The proprietor of a sawmill has a lien on the product of the mill for work done on material furnished by others.—MURPHEY v. MCGOUGH, Ga., 31 S. E. Rep. 757.

63. LIFE INSURANCE—Contracts—Fraud.—In an action to rescind a contract of life insurance on the ground of the oral fraudulent representations of the insurer's agent who took the application as to the terms of the policy, which the insured, relying on the representation, did not read until six weeks afterwards, when he

for the first time actually discovered the fraud, held, that the fraudulent representations constituted a ground for rescission, although the policy provided that no statements, promises, or information made or given by the person soliciting or taking the application for a policy should bind the company, or affect its right, unless reduced to writing and presented in the application to the officers of the company at the home office.—McCARTY v. NEW YORK LIFE INS. CO., Minn., 77 N. W. Rep. 426.

64. LIFE INSURANCE—Representations.—An applicant for life insurance, in answer to a question, stated that he had never directly or indirectly been engaged in the sale of wines or liquors. He had during 10 years, ending 5 years before the application was made, been engaged in business as a druggist in connection with which he had sold considerable quantities of liquors. In an action on the policy, it was held that if the statement was made willfully, with intent to deceive, was relied on, and did deceive, it would avoid the policy, though immaterial to the risk; but if it was made incidentally, without reckless intent, and without having in mind the distinction between the traffic in liquors as a traffic by itself and as one incidental to the druggist's business, where it was not material to the risk, it would not constitute a defense.—HADLEY v. PROVIDENT SAV. LIFE ASSUR. SOC. OF NEW YORK, U. S. C. C., D. (Mass.), 90 Fed. Rep. 390.

65. LIMITATIONS — Accommodation Indorsers.—Indorsers in blank of a note before delivery to the payee being declared by Code, § 50, liable as sureties to any holder, a partial payment by the maker after maturity is a payment by them, as regards the statute of limitations.—MOORE v. CARR, N. Car., 31 S. E. Rep. 832.

66. MARRIED WOMEN—Execution of Mortgages.—Under Const. art. 10, § 6, providing that the property of a married woman may be conveyed by her "with the written assent of her husband" as if she were a *feme sole*, and Code, § 1258, providing that every conveyance affecting the real estate of any married woman must be executed by such married woman and her husband, the execution by a married woman of a mortgage on her dower interest to secure the same debt for which the husband had previously executed a mortgage on the same property is insufficient where executed by her alone.—SLOCOMB v. RAY, N. Car., 31 S. E. Rep. 829.

67. MASTER AND SERVANT — Machinery — Assumed Risks.—A servant who, without objection or promise to repair, worked for three years with a defective machine, which he knew, or by the exercise of ordinary care could have known, was dangerous, cannot recover for injuries resulting from the defect.—McCARTHY v. MULGREW, Iowa, 77 N. W. Rep. 527.

68. MASTER AND SERVANT—Assumption of Risk.—The doctrine of the assumption of obvious risks by the servant applies as well to those which first arise or become known to the servant during the services as to those in contemplation at the original hiring.—JOHNSON v. DEVOE SNUFF CO., N. J., 41 Atl. Rep. 936.

69. MECHANIC'S LIEN — Foreclosure.—A mechanic's lien may be foreclosed against the holder of an equitable interest in property without the holder of the legal title being made a party.—SHEPPARD v. MESSENGER, Iowa, 77 N. W. Rep. 515.

70. MECHANICS' LIENS — Original Contractors.—Shannon's Code, § 3531, giving a lien on buildings erected by special contract with the owner or his agent, in favor of "the mechanic or undertaker, finder or machinist who does the work or any part of the work or furnishes any of the material," applies only to original contractors.—HAYNES v. HOLLAND, Tenn., 48 S. W. Rep. 406.

71. MORTGAGES — Attorney's Fees.—A mortgage providing that it shall secure, in addition to the principal debt, all sums in any way to become due, including attorney's fees, does not include sums due for services of a stranger in trying to obtain an extension of the mortgage, where he is unsuccessful.—STECKEL v. STANDLEY, Iowa, 77 N. W. Rep. 489.

72. MORTGAGE — Equitable Mortgages.—Where the true object of a sale with the right of redemption was to secure an existing indebtedness, the court, called upon to interpret and give effect to the agreement, properly held the parties to their intention, by decreeing the title asserted not one from which ownership resulted, but as a kind of security for the debt due.—DAVIS v. KENDALL, La., 24 South. Rep. 264.

73. MORTGAGES — Foreclosure—Parties.—In foreclosure of a trust deed, an adverse claimant who holds under an independent, outstanding title, not derived from the mortgagor, cannot be made a party defendant, since his title cannot be determined in the foreclosure suit.—WOLF v. HARRIS, Tex., 48 S. W. Rep. 529.

74. MORTGAGES — Foreclosure — Purchase by Mortgagee.—While a mortgagee cannot himself become the purchaser at a sale of the mortgaged property had under the execution of a power contained in the instrument, unless the mortgage expressly authorizes him to do so, a purchase by him at a sale, made fairly and without fraud, is not void, but only voidable, at the election of the mortgagor to redeem at any time before final judgment of eviction.—STANDBACK v. THORNTON, Ga., 31 S. E. Rep. 805.

75. MORTGAGES—Mechanics' Liens—Priorities.—Rev. St. 1889, § 6706, confining a mechanic's lien to the right, title, and interest of the owner of a building, and section 6707, providing that the lien shall attach to the building in preference to any prior mortgage on the "land," do not give a lien prior to a mortgage on a house and lot, where the house, being two-thirds destroyed by fire, is reconstructed under contract with the owner only.—SCHULENBERG v. HAYDEN, Mo., 48 S. W. Rep. 472.

76. MORTGAGES—Redemption.—Code 1886, § 1888, providing that when land has been conveyed by a parent to a child, and sold as the property of the parent, the child can redeem within the time and on terms prescribed, entitles a son to whom his mother conveyed an equity of redemption to redeem from foreclosure sale, notwithstanding that Acts 1888-89, p. 764, conferring the right to redeem on assignees of the equity of redemption, does not avail him, because enacted after the date of the mortgage.—JONES v. MATKIN, Ala., 24 South. Rep. 242.

77. MORTGAGE—Right to Foreclose.—A trust deed may be foreclosed for a default in the payment of interest, even though a guarantor thereof has paid it to protect his guaranty.—BUTLER BLD. & INV. CO. v. DUNSWORTH, Mo., 48 S. W. Rep. 449.

78. MORTGAGE — Subrogation.—One who advances money to pay off an incumbrance upon realty, at the instance of the owner thereof, and upon the express understanding that the advance made is to be secured by the immediate execution of papers which will constitute a first lien on the property, is not a mere volunteer; and, in the event the new security thus taken turns out to be defective, the person parting with his money on the faith thereof, if not chargeable with culpable and inexcusable neglect in the premises, will be subrogated to the rights of the prior incumbrancer under the security held by him, unless the superior or equal equities of others would be prejudiced thereby.—MERCHANTS' & MECHANICS' BANK v. TILLMAN, Ga., 31 S. E. Rep. 794.

79. MUNICIPAL BONDS—Limit of Indebtedness.—Bonds issued by a school district which was indebted beyond the constitutional limit may be enforced where they were issued and used for the purpose of funding a valid outstanding judgment against the district.—JAMISON v. INDEPENDENT SCHOOL DIST OF ROCK RAPIDS, LYON COUNTY, IOWA, U. S. C. C., N. D. (Iowa), 90 Fed. Rep. 387.

80. MUNICIPAL CORPORATIONS—Ordinance.—An ordinance making it a misdemeanor to "stop, stand, or detain" any "carriage, hack, or vehicle" used to carry passengers or freight for hire, on any of certain named streets, or in front of any public hotel in the city, except when actually engaged in receiving or delivering

passengers or freight, is an unreasonable and oppressive and invalid exercise of the power given a city charter to license, tax, and regulate hackmen, draymen, etc., and to regulate stands for their vehicles, and to prevent the incumbering of the streets with any vehicle whatsoever.—EX PARTE BATTIS, Tex., 48 S. W. Rep. 513.

81. MUNICIPAL CORPORATIONS — Occupation Tax.—Rev. St. 1895, art. 490, providing that municipalities shall have power to levy and collect taxes on trades, professions, or businesses carried on, for the public use, in vehicles, in so far as it authorizes the imposition of taxes on occupations not taxed by the State, violates Const. art. 8, § 1, providing that taxes on occupations levied by any city shall not exceed one-half the taxes levied thereon by the State, since a tax must be first imposed for the benefit of the State on such occupation before a city could tax it.—EX PARTE TERRELL, Tex., 48 S. W. Rep. 504.

82. MUNICIPAL CORPORATION — Ordinance — Occupation Tax.—An ordinance imposing a tax upon "merchandise, meaning dealers in varied stock of goods," and also imposing taxes upon persons engaged in the sale of various articles which would be embraced under the term "merchandise," will not, unless the term of the ordinance imperatively require it, be construed to authorize the collection of more than one tax upon dealers in general merchandise.—WYNNE V. MAYOR, ETC. OF CITY OF EASTMAN, Ga., 31 S. E. Rep. 737.

83. NEGLIGENCE — Electric Wires.—A company authorized to place wires in public highways, which wires it uses in its business to transmit an electric current which is dangerous, must exercise a high degree of care to prevent injury to any person using the highways for passage; but to one who, with others, breaks down such wires, and so exposes them, uninsulated and dangerous, it owes no duty except to refrain from willful acts to his injury, and it will not be responsible for an injury received by him while handling the wires so broken, because it maintained or renewed the current passing over them.—NEWARK ELEC. LIGHT & POWER CO. V. MCGILVERY, N. J., 41 Atl. Rep. 955.

84. NEGOTIABLE INSTRUMENT — Invalid Check—Purchaser for Value.—Bad faith in the purchase, for value, of an invalid and void bank check, may be partly evidenced by the gross negligence of the purchaser. It may also be shown by a variety of circumstances, some of them slight in character and others of greater significance.—DREW V. WHEELIHAN, Minn., 77 N. W. Rep. 558.

85. PARTNERSHIP — Creation — Member's Liability.—Where two firms of tobacco dealers, one in Virginia and the other in England, agreed that the American firm should buy tobacco in this country, and ship it to the English firm to be sold on their joint account, and agreed to bear the expenses, and divide the profits and losses of the business equally, the members of each firm are partners, so far as this business is concerned.—COMMERCIAL BANK OF LYNCHBURG V. MILLER, Va., 31 S. E. Rep. 812.

86. PARTNERSHIP—What Constitutes.—One who loans money to another to be used in a business enterprise, and the borrower agrees to pay legal interest thereon, and one-third of the profits in addition, the lender thereby becomes a partner as to a creditor of the borrower, whose debt arose after the loan was made, in the course of the business.—DILLEY V. ABRIGHT, Tex., 48 S. W. Rep. 548.

87. PLEADING—Parties—Homestead.—When the legal title to a homestead is in a wife, but the larger portion of the purchase price was paid by the husband, their joint interest in the preservation of the homestead gives them the right to join as plaintiffs in an action to enjoin its sale.—ANDERSON V. DAVIS, Utah, 55 Pac. Rep. 363.

88. PRINCIPAL AND SURETY—Notes—Renewal.—Sureties on a note, on its maturity, executed a joint note to the payee, on the margin of which he made an indorsement to the effect that payment of the note would cancel the old note, which was attached. Held, that this was a renewal of their surety obligation, and not the creation of a new and independent indebtedness.—MERCHANTS' NAT. BANK OF CLINTON V. EYRE, Iowa, 77 N. W. Rep. 498.

89. RECEIVER — Expenses Allowed.—When the appointment of a receiver is revoked as erroneous, the expenses incurred during the receivership, which should be allowed and paid out of the funds, are only such as would necessarily have been incurred had no receiver been appointed.—OGDEN CITY V. BEAR LAKE & RIVER WATERWORKS & IRRIGATION CO., Utah, 55 Pac. Rep. 385.

90. RELEASE AND DISCHARGE—Fraud.—A settlement of an action by plaintiff with defendant's attorney direct is not fraudulent because defendant's attorney stated that it could be made in the absence of plaintiff's attorney, where plaintiff and his mother were the moving parties, and went to the town where the attorney was located in order to procure it.—JOHNSON V. CHICAGO, R. I. & P. RY. CO., Iowa, 77 N. W. Rep. 476.

91. RELEASE AND DISCHARGE — Impeachment for Fraud—False Statements.—To entitle a plaintiff to avoid a release for fraud, in law or equity, because of untrue statements knowingly made by defendant, it must appear, first, that defendant made such statements intending that the plaintiff should act upon them; and, second, that they were a substantial inducement to the execution of the release.—WAGNER V. NATIONAL LIFE INS. CO. OF MONTPELIER, VT., U. S. C. C. of App., Sixth Circuit, 90 Fed. Rep. 395.

92. RELIGIOUS SOCIETIES—Property Rights—Change of Doctrine.—Property dedicated to the support of a particular church becomes a trust for the support of the particular doctrine taught by that church at the time of the dedication, and the members of the church, however small the minority, who adhere to such doctrine, are entitled to the property, as against those who depart therefrom.—PEACE V. FIRST CHRISTIAN CHURCH OF MCGREGOR, Tex., 48 S. W. Rep. 534.

93. SALES—Evidence.—An agreement in parol between a mortgagor and mortgagee for the transfer of chattels in payment of the mortgage debt transfers the title, without specific delivery of the property.—DOWNEY V. TAYLOR, Tex., 48 S. W. Rep. 541.

94. SCHOOLS AND SCHOOL DISTRICTS—Reorganization.—Under Code 1873, § 1715, which provides that, on the formation or change of boundaries of independent districts, the respective boards of directors, or, in case of their failure to agree, arbitrators chosen by them, shall make an equitable division of the "then existing" assets and liabilities between the old and new districts, no other assets and liabilities can be considered, in making such division, after the formation of a new district, than those existing at the time such new district was organized.—INDEPENDENT DIST. OF CORWITH V. DISTRICT TP. OF LUVERNE, Iowa, 77 N. W. Rep. 525.

95. SHERIFFS—Wrongful Execution of Writ of Replevin.—In the statutory action of replevin in Indiana, the plaintiff is required to state by affidavit that he is the owner, or is lawfully entitled to the possession, of the property described, which is unlawfully detained by the defendant; and the writ issued commands the officer to take the property from the possession of the defendant named therein. Held, that such a writ confers no authority on the officer to take the property from any other person than the defendant named, and if he executes it by seizing and taking the property by force from a stranger to the writ, who is the *bona fide* owner and in the actual possession, he may be sued in trespass therefor in a federal or other court having jurisdiction.—MCDOWELL V. MCCORMICK, U. S. C. C., D. (Ind.), 90 Fed. Rep. 393.

96. TAXATION—Assessment—Sales.—A tax sale is invalid where it was not made for all delinquent taxes against the land, with interest and costs.—MEDLAND V. CONNELL, Neb., 77 N. W. Rep. 487.

97. TAXATION—Inheritance Tax Law—Construction.—Inheritance Tax Law, § 1 (Laws Mont. 5th Sess. p. 83), provides that all property within the State passing by will, other than to a decedent's father, mother, husband, wife, etc., shall be subject to a tax of $5 on every $100 of its market value; that when the beneficial interest of any personal property passes to any father, mother, husband, wife, etc., the rate of tax shall be $1 on every $100 of its market value; and that in all other cases the rate shall be $5 on every $100 of the market value of all property, provided that any estate of less than $500 valuation shall not be subject to the tax. Held, that real estate devised by testator to his widow is not subject to the tax.—HINDS v. WILCOX, Mont., 55 Pac. Rep. 355.

98. TAXATION—Powers of Municipality.—A municipality has no power to collect a tax upon property or business situated so that it cannot receive any protection or benefit from it, and the legislature cannot extend or maintain the limits of a city for such purpose, and which has such an effect.—KAYSVILLE CITY v. ELLISON, Utah, 55 Pac. Rep. 386.

99. TENANCY IN COMMON—Partition — Contribution.—Where one co-tenant insists on having disputed lands included in partition proceedings, agreeing to take the risk, and on partition deliberately takes the share including such lands, he is estopped from claiming contribution from his co-tenants on being subsequently evicted therefrom; especially where they did nothing to involve him or the estate in litigation.—BUSSELL v. KING, Tenn., 48 S. W. Rep. 310.

100. TENANTS IN COMMON — Homestead.—Where land is sold, by order of court, subject to a homestead right, the purchaser and homesteader are tenants in common, and entitled to share equally in crops growing at the confirmation of the sale; and this, though the sale was confirmed without a reservation of the rents, and the homestead was not assigned, nor the purchaser put in possession, till after the crops were gathered.—O'BRYAN v. BROWN, Tenn., 48 S. W. Rep. 315.

101. TRUST—Husband and Wife—Constructive Trusts.—Where a wife allowed her husband to use her property in his business, expecting that she would be compensated therefor, and he invested it in real estate in his own name,—there being no understanding that the title should be taken in her name,—there is no constructive trust.—SHUPE v. BARTLETT, Iowa, 77 N. W. Rep. 455.

102. TRUST—Parol Trusts — Enforcement.—In an action to enforce a parol trust it appeared that the land was sold under execution, and bought in by the judgment creditor, who, at the debtor's request, on payment of the debt, deeded it to the latter's son, who agreed to deed it back to his father, when he should so request. The testimony disclosed that the conveyance was made to defeat creditors, but it was not alleged that the agreement was made for that purpose. Held, that the trust should have been enforced.—TAYLOR v. MCMILLAN, N. Car., 31 S. E. Rep. 730.

103. USURY.—Where the surety in a note on which usurious interest had been paid agreed with the principal, for a valuable consideration, to pay the debt, and the payee accepted his note for the balance due, without deducting usury, the principal, who was thereby discharged, may recover of the payee the usury theretofore paid by him.—MANN v. BANK OF ELKTON, Ky., 48 S. W. Rep. 413.

104. USURY—What Constitutes.—A contract whereby the borrower of money agrees to repay to the lender a sum exceeding the amount borrowed, with the maximum legal interest added thereto, although it provides, with certain restrictions, that the portion of the debt remaining unpaid on the death of the borrower within a time fixed shall not be collected, is subject to cancellation, under Minn. Gen. St. 1894, § 2217, providing for the cancellation of usurious contracts.—MISSOURI, K. & T. TRUST CO. v. KRUMSEIG, U. S. S. C., 19 S. C. Rep. 179.

105. VENDOR'S LIEN — Redelivering Deed.—There is no vendor's lien where the vendor declines such security, and demands personal security.—PETERSON v. CARSON, Tenn., 48 S. W. Rep. 383.

106. WAREHOUSEMAN — Contract to Insure.—A mere statement in a warehouse receipt, "All cotton stored with us fully insured," will not alone constitute a contract between the parties, requiring the warehouseman to insure the cotton of his customer, and rendering him liable for the value of the same when destroyed by fire.—ZORN v. HANNAH, Ga., 31 S. E. Rep. 797.

107. WILLS—Capacity to Revoke.—A testator has capacity to revoke a will if he has full and intelligent knowledge of his property, of those entitled to his bounty, and of the nature of the act, notwithstanding he is incapable of making contracts and is under guardianship.—LINKMEYER v. BRANDT, Iowa, 77 N. W. Rep. 493.

108. WILLS—Codicil — Cumulative Legacies.—Where two legacies are given simpliciter to the same legatee by different instruments, the presumption is that the later is cumulative, whether its amount be equal or unequal to the former. Held, in this case, that six legacies given by the fifth codicil to the will are not substitutional for six legacies given to the same legatees by previous codicils, both because of the rule of interpretation stated, and because of a manifest intention in keeping therewith.—DICKINSON v. OVERTON, N. J., 41 Atl. Rep. 949.

109. WILLS—Heirs—Life Estate.—A will provided that testator's sons should pay small legacies to certain persons, and, after leaving a tract of land to one son, provided: "The balance of my 325 acres of land to be equally divided between the heirs of (the other two sons) so as to give each one the homestead he now occupies." Held, that the two sons took no more than a life estate, and therefore the widow of one of them had no homestead therein.—ARRANTS v. CRUMLEY, Tenn., 48 S. W. Rep. 342.

110. WILLS — Nature of Estate.—A residuary gift of the net income of lands to A, his heirs and assigns, without limit of time, or gift over to other persons or other disposition made, will be held to be a devise to A of the title in the lands in fee.—PASSMAN v. GUARANTEE TRUST & SAFE-DEPOSIT CO., N. J., 41 Atl. Rep. 953.

111. WILLS—Signing by Mark.—Where a testator was unable to write his name, making his mark is a "signing," within the meaning of the law, requiring a will to be "signed" by the testator.—SCOTT v. HAWKS, Iowa, 77 N. W. Rep. 467.

112. WILLS — Testamentary Character of Paper.—A paper, the first part of which is in the form of a will, and which is witnessed as a will, but which contains the usual *habendum* clause of deeds, and provides that the persons named as devisees are to support the donor and his wife during their lives, and pay their burial expenses, and are to take possession of the land devised at once, and pay the taxes on same, is not testamentary in character, and cannot be admitted to probate as a will, nothing being left to be done after the donor's death.—WARD v. WARD, Ky., 48 S. W. Rep. 411.

113. WITNESSES—Competency—Husband and Wife.—Although under Mill. & V. Code, § 4563 (Shannon's Code, § 5596), disqualifying husband or wife from testifying as to matters occurring between them by virtue of the marital relation, they may not testify to prove a gift from the husband to the wife and an arrangement between them by which its proceeds were invested for her, yet she can testify that she held and claimed the gift and its proceeds after it was made, and that the proceeds were invested in property, the title to which was taken in her name, and which she claimed.—YOUNG v. HURST, Tenn., 48 S. W. Rep. 355.

114. WITNESSES—Contradiction.—One making the adverse party his witness may prove his case by other evidence, though it contradicts such party's testimony.—IMHOFF v. MCARTHUR, Mo., 48 S. W. Rep. 456.